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Supreme Court of the United States

OCTOBER TERM, 1891.

DAVID L. HAMMOND *et al.*,
Plaintiffs in Error,

vs.

No. 114.

WALTER S. JOHNSTON, Receiver of the National Bank of the State of Missouri, and CLARA A. BAKER,
Defendants in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT AND BRIEF FOR PLAINTIFFS IN ERROR.

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On the 15th day of June, 1874, the plaintiffs in error brought this action of ejectment against Levin H. Baker (since died) and Clara, his wife, for a tract of land of about ten acres, situated then in the

county of St. Louis, but now within the western limits of the City of St. Louis.

The land is part of United States Survey No. twenty-five hundred, located under New Madrid Certificate No. 161, in the name of "Joseph Hunot, or his legal representatives." (Record, page 26.)

Both parties to this suit claim title under said location, and therefore the validity of the location is not in dispute, but only the effect produced on the title by the *different stages of the location*, till the date of the patent, August 30th, 1859, and its approval and order of delivery by the Secretary of the Interior, November 12th, 1860. And also an Act of Congress of June 30th, 1864 (U. S. Statute, vol. 13, p. 581), granting the land covered by the survey to "Joseph Hunot or his legal representatives."

The different steps in the chain of title, and in the location of the New Madrid certificate, under which the controversy here arises, are, briefly, as follows:

Joseph Hunot was a resident in New Madrid county, Missouri, in 1803, at the date of the treaty transferring Louisiana from France to the United States, and was the occupant of, and claiming title to, a tract of land in said county *as a "settlement right."* He filed his claim to said land, in due time, before the Board of Commissioners created and continued by the Acts of Congress of March 2, 1805 (vol. 2, p. 325), April 21st, 1806, and March 3d, 1807 (vol. 3, p. 440), for the purpose of passing upon titles of land claimed by the settlers in said territory. The claim of Hunot was rejected by said board, but under the provisions of the Acts of Congress of June

13th, 1812 (U. S. Statute, vol. 2. p. 748), and March 3d, 1813 (vol. 2, p. 812), Frederick Bates, as recorder of land titles for the territory of Missouri, recommended it for *confirmation* in his report to Congress, dated November 1st, 1815.

That recommendation, with others, was confirmed by Act of Congress of April 29th, 1816 (U. S. Stat., vol. 3, p. 328), thus making a fee-simple title to said land in New Madrid county. In May, 1810, after the claim had been filed before the board, but *before* the board had acted upon it, Joseph Hunot sold said land to one Joseph Vandenbenden by a *full warranty deed*, *except* as against the United States. (Record p. 16.) On the 4th of November, 1815, *after* Bates had recommended the claim to Congress for confirmation, Vandenbenden sold said land to Rufus Easton of St. Louis, with *full warranty*, except against the United States. (Record, p. 19.) On the 12th of August, 1816, Frederick Bates, as recorder of land titles, acting under the provisions of the Act of Congress of February 17th, 1815, commonly known as the New Madrid Act (U. S. Statutes, vol. 3, p. 211), issued his certificate number 161 for 480 acres of land to "Joseph Hunot or his legal representatives," stating that the Hunot tract of land (describing it) in New Madrid county had been materially injured by earthquakes, and authorizing Hunot or his legal representatives, to locate said certificate on any of the public lands in the territory of Missouri, "the sale of which is authorized by law." (Record, p. 23.)

On the 14th of November, 1816, Rufus Easton, being then the absolute owner *in fee* of the New

Madrid land, made an application to the surveyor of lands of the United States for the territory of Missouri to *locate* said certificate in Howard county, in the western part of Missouri. Whether any action, or what action was taken on that application does not appear, but on the 16th of June, 1818, said Easton made *another application* to the surveyor of lands to locate said certificate in township 45 N., range 7 East, "the township in which St. Louis is situated," and giving a general description of the land, sections and parts of sections, that he wanted. (Record, p. 24.) About one year after that, June 23d, 1819, the land he asked for was surveyed, or platted from other surveys, by Joseph Brown, deputy surveyor, and became known as United States Survey 2,500, "for Joseph Hunot or his legal representatives." (Record, p. 25.) This survey was not *filed* or *recorded* in the office of the recorder of land titles till *January* 8, 1833. (Record, p. 28.) On the 10th of July, 1819, about *two weeks after the plat was made*, Rufus Easton made to *William Stokes* a warranty deed of two hundred and thirty-four acres, covering the southern part of said survey. In the description in that deed there is a reference to a "*corner* in Colonel Samuel Hammond's survey." About *four years* after this, by a full warranty deed, dated September 29th, 1823, and acknowledged by Easton and wife *on the 9th of October*, 1823, Rufus Easton and wife conveyed to Samuel Hammond two hundred and forty acres of said land, and "the *whole* of the tract, except 234 acres of the land of said tract conveyed to William Stokes by deed of 1819, to-wit: 480 acres, described as follows:"—then he describes the

480 acres in the same terms as he did in his application to have his certificate located.

In this deed Easton says: "In consideration of $1,583 paid me by Samuel Hammond, and pursuant to the conditions of a certain bond executed by said Rufus Easton to said Samuel Hammond and James J. Wilkinson, dated *September 3d*, 1818, I grant, bargain and sell, etc." This bond purports to have been made in less than *three months* after Easton had made his application to locate, and *nine months* before the survey was made or plated. No such bond or a copy of it has ever been seen or heard of except as mentioned in said deed. (For deed, *vide* record, page 31.)

On the 22d day of May, 1823, in the Supreme Court of Missouri, a judgment against Samuel Hammond for over six thousand dollars, on writ of error to the Circuit Court, was affirmed, and on the *5th day of September*, 1823 (twenty-four days *before* the date of the deed of Easton to Hammond), on an execution issued from said Supreme Court, by the clerk thereof, against said Hammond, and in favor of Richard Relf, Beverly Chew and Mary Clark, the sheriff of St. Louis county seized sundry parcels of land as the property of Samuel Hammond, and among them was the 240 *acres* afterwards conveyed to him by Easton, as a part of the Hunot survey. It sold for one hundred dollars, and the description by the sheriff is vague and uncertain, but the Supreme Court of Missouri have decided that it was sufficient to cover the 240 acres. The sale on execution took place on the *8th day of October*, 1823, and all the lands were bid in by Relf and Chew.

the plaintiffs in execution. This was *one day* before the deed from Easton and wife to Hammond was acknowledged, and nine days after the date of the deed of Easton to Hammond. (Record, pages 71, 72, 73, 75.)

Relf and Chew made no conveyance of this land till March, 1840, when they conveyed it to Peter Lindell by the same description as was in the deed of the sheriff to them.

It is in evidence, however, that Peter Lindell was then in *possession of the land, and had been since* 1831, and had it all, or nearly all, under fence. Lindell held it till he died in 1861, and then in the partition of his large estate among his ten nephews and nieces, the piece here in controversy went to his nephew, Levin H. Baker, and he conveyed to his wife, the original defendants in this suit; and from them by foreclosure of a deed of trust, to the *National Bank* of Missouri, of which the defendant Johnston is the receiver. The land is unimproved, except a house and some outbuildings built by Baker more than twenty years since.

Samuel Hammond was a resident of St. Louis till about 1824, when he left and went to South Carolina, and remained there till he died, about 1842.

All of the *original* plaintiffs, except J. L. D. Morrison, are the heirs of Samuel Hammond (mostly grandchildren), and claim title as such. An undivided interest in said land was conveyed by said heirs to said Morrison in 1874, before this suit was brought. All the Hammond heirs were residents of the Confederate States during the war.

When the sale was made on the execution of Relf and Chew and Clark against Hammond, October 8th, 1823, the territorial laws of Missouri, as to sales of land on execution, were then in force. *Vide* Territorial Laws, Vol. 1, p. 120, Sec. 45, which says: "The sale shall pass to the purchaser *all the estate* the debtor had or might *lawfully part with*, in the lands, *at the time judgment was rendered.*" A copy of the statute is printed as appendix to this brief.

At the date the said judgment against Hammond was rendered, no paper of any kind had passed between Easton and Hammond, except "a bond from Easton to Hammond and Wilkinson," referred to as before stated in the deed, and dated *nine months* before any survey was made or platted by the deputy surveyor.

In reference to this part of the case, the plaintiffs asked of the trial court the following instruction: No. 11. "The court is requested to declare "the law to be, that under all the documentary ev- "idence put in the case, there was, in 1823, no legal "nor equitable title in Samuel Hammond to any "part of the land in what is now known as United "States Survey 2,500, in the City of St. Louis, and "that for that reason (having no reference to any other) no title, legal or equitable, to any part of "said land was acquired by the purchasers under "the levy and sale, by Sheriff Walker, on execution "against said Hammond in September and October, "1823, as put in evidence by defendants in this "case." (Record, page 397.)

This instruction was given by the *trial court*,

but was *overruled* by the Supreme Court. Upon this part of the case the *defendants asked*, and the *trial court gave*, the following instruction: "14. "When the *patent* to Joseph Hunot, or his legal re- "presentatives, read in evidence by the defendants, "was issued, the same related at least as far back "as the time of the passage of the Act of *Congress of* "*April* 26th, 1822, if not, to *June* 23d, 1819, which "is the time the *field survey* was made of the land "for which said patent was issued." (Record, page 399.)

This last instruction the Supreme Court of Missouri plainly *maintained* in the view they took of the "doctrine of relation," as laid down in their opinion.

Why the defendants' attorney put the Act of Congress of April 26th 1822, into his instruction, I never could understand, as that act related only to certificates laid not in conformity to sectional lines, and requiring locations to conform to sectional lines, and to be made within one year.

Upon the foregoing facts, the first question for this court is raised, that is—whether or not there was in 1823, any legal or *equitable title* to said land *out of the United States and into Samuel Hammond* that could be sold on execution in Missouri, where the law authorized the sale of *equitable titles* on execution; and to *what point* in the *chain of title* under the different steps in the location of a New Madrid certificate, the *fee to the land*, when a patent issues, *relates back and makes that point the "initiatory step"*

in the chain of title, and gives to the locator *any rights* that can be called *equitable* and *saleable on execution?*

Also one other question is involved and presented to this court under the writ of error, and is raised upon the facts involved in the *issuance of the patent*, and the effect it has upon the statute of limitations, as to the title of one of the plaintiffs.

The original plaintiffs (except Morrison) were all residents of the *Confederate States* during the war of the rebellion. The decisions of this court upon the effect of the war, in suspending the running of the statute of limitations, and the time the statute was suspended in each Confederate State, were *respected* by the Supreme Court of Missouri in its opinion in this case; but one of the plaintiffs, owning *a fifteenth*, was, for the first part of the time during the civil war, in the State of Tennessee, which State was not declared, by proclamation, to be in rebellion till *August* 16th, 1861; but the other States where plaintiffs resided, were declared by proclamation to be in rebellion from *April* 19th, 1861. This difference of time affects the rights of the *one who was in Tennessee*, and makes it material to determine *when* the *fee* to this survey passed out of the United States. Whether it was at the *date* of the patent, *August* 30th, 1859, or not till *November* 12th, 1860, when the *Secretary of the Interior* had passed upon the questions involved and *ordered it issued*.

It appears from the evidence in the case, that before August 30th, 1859, there had been a controversy before the Commissioner of Lands, whether or

not a patent should issue upon the Hunot survey. It was opposed by the Pacific Railroad and others, but the acting commissioner of lands seems to have thought that a patent *ought* to issue; and he appears to have *drawn up a patent*, dated August 30th, 1859, and on that day, *after it was recorded*, sent it to the President's secretary for signing patents, *to be signed*. The letter transmitting the patent for the President's signature, is as follows: (Record, page 181.)

"General Land Office, April 30th, 1859.

"*To the President's Secretary for Signing Patents:*

"Your signature is requested to the patent here-
"with sent, as recorded, volume 2, pages 405 to 413,
"inclusive, in favor of Joseph Hunot, or his legal re-
"presentatives, for a private claim in Missouri,
"Survey No. 2,500, Patent Certificate No. 492.

"Jos. S. Wilson, Acting Com."

The next that is heard from the patent is from the following letter from the land office at Washington, to the recorder of land titles, St. Louis, which is as follows: (Record, page 298.)

"General Land Office, April 6th, 1860.

Sir:—This office has *drawn up the patent* for what is known as "the Hunot New Madrid claim,
"designated as survey 2,500, in T. 45, N. R. 7 E.
"of 5th P. M. Mo. But looking to the fact that in
"the papers received with Surveyor-General Lough-
"borough's report of 10th of February, 1859, the
"opponents to the survey either contemplated or
"proposed to seek *by appeal the highest executive de-*
"*cision* in the premises, the case was *submitted to the*

"*Hon. Secretary* of the Interior on the 22d *of De-*
"*cember*, 1859, *for his revision*, etc. On the 5th
"inst. a communication to this office (copy here-
"with), he decides as follows: 'If the parties who
"protest against issuing the patent, after having
"been advised of "our decision," do not, within
"a reasonable time thereafter, take an appeal in the
"matter, the patent should be delivered to the
"claimant.' In view of said decision, you are in-
"structed to notify the parties opposed to the *prep-*
"*aration of said patent*, that if no appeal is filed in
"this office on or before the 7th of May next, said
"patent will be sent to you for delivery to the par-
"ties entitled to receive it. Enclosed is our printed
"rules respecting appeals.

"Very respectfully your ob't serv't,

"JOSEPH S. WILSON,
"Commissioner.'"

"A. BENARD, ESQ.,
"Recorder of Land Titles,
"St. Louis, Mo.

The attorney of the Pacific Railroad applied for an appeal in April, 1860, which was granted, and the case was before the Secretary of the Interior till *November* 12th, 1860, when he sent his opinion to the general land office at Washington, ordering the patent to issue. The opinion is found on pages of the record, 298-9 and 300.

From this opinion, it appears that the secretary had to consider grave and important questions, as to whether or not the land department could properly issue a patent upon the survey.

On this state of facts the plaintiffs asked the following instruction, in the trial court, which was *given by that court*, but *overruled* by the Supreme Court: (Record, pages 397-8.)

"12. The court declares the law to be, that "if the officers of the United States Land Depart- "ment declined to issue or deliver the patent for "said survey 2,500, to any person claiming said "lands, *or to recognize its validity as a patent* till "November 12th, 1860, then said patent was not "effective to convey any title out of the United "States till it was so issued by the said department "in November, 1860, and that the statute of limita- "tions only began to run in favor of defendants by "virtue of said patent, from and after that time."

On the construction of those three papers, and the fact of an appeal being taken to the Secretary of the Interior within the time specified by the Secretary of the Interior, depends the question as to whether the statute of limitations began to run in favor of disseisors on the 30th *of August*, 1859, or not till *November* 12th, 1860.

In the foregoing statements, we have endeavored to state all material facts and the questions arising on the same.

Secondly. The errors relied upon and filed in this court with the record of the case, are as follows: (Record, pages 3 and 4.)

"1st. The said court (Supreme Court of Missouri), erroneously held and decided that there was, on the facts appearing in the record, as to the location of New Madrid certificate No. 161, *an equitable*

title to the land in controversy in Samuel Hammond (under whom plaintiffs claim), *on the eighth day of October*, 1823, which could be *levied upon by the sheriff and sold on the execution against said Hammond*, issued on a judgment against said Hammond, rendered on the 21st day of May, 1823, and that by such levy and sale an *equitable title* to said land passed from said Hammond to the purchasers under said execution sale, and under which purchasers defendants claim—whereby a grievous error against plaintiffs was committed by said court."

"2d. That said court erroneously decided that the patent issued on said land, as appears by the record, was operative from *its date* on the 30th of August, 1859, and took the fee-simple title out of the United States on said 30th day of August, 1859, though the decision of the land commissioner at Washington was in due time appealed from to the Secretary of the Interior, and though said secretary's decision to issue said patent was not made until November 12th, 1860, as appears by his decision in the records of the case."

"3d. That said court erroneously gave judgment in said case for the defendants, whereas judgment should have been given for the plaintiffs; wherefore plaintiffs pray that said judgment "*be reversed* and judgment given for the plaintiffs; and "to that end the plaintiffs pray that a writ of error "out of the Supreme Court of the United States, "under the seal of said court, may issue to the "Honorable Judges of the Supreme Court of Mis-"souri, commanding said court to send a duly cer-

"tified copy of the records and proceedings in the "case aforesaid to the Supreme Court of the United "States at Washington, so that the same may be at "Washington on the second Monday of October, "1888."

By order of the Supreme Court of Missouri, the *opinion* is made a *part of the record*, and is sent to this court as such. (Record, page 3.)

Third A brief of the argument, stating the law and facts to be discussed.

I hope it will not be deemed irrelevant or impertinent if I say, at the opening of the argument in this case, that upon a pretty full and careful examination of the Missouri Supreme Court reports, as well as from my own recollection for many years, I do not find that any member of said court, when this case was argued, was on the bench of said court when any *other case* was argued, touching the construction of what is known as the New Madrid statute involved in the decision of this case. They were therefore not familiar with the construction of that law, which has been so fully and frequently discussed and settled by this court.

And I do not find that this court, since the decision in the Hot Springs cases, so called, decided in 1875, reported in 2d Otto, have had occasion to consider the construction put upon that law, and have only alluded to it in the case of

Rector v. Gibbon, 111 United States R. p. 279,

(decided in 1883), as having been settled by former decisions of this court. The statute known

as the *New Madrid Act*, passed February 17th, 1815, is not found in the *Revised* Statutes of the United States, but is found in the third volume of the U. S. Statutes, at page 211. Its functions had ceased before the statutes were revised. The provisions of that statute and its proper construction, have been very fully passed upon and settled by sundry decisions of this court, the last one of which was in 1875, known as one of the Hot Springs cases, 2d of Otto, 712. The cases construing this statute are:—

Bagnell v. Broderick, 13 Peters, 436.
Stoddard v. Chambers, 2d Howard, 284.
Barry v. Gamble, 3d Howard, 51.
Lessieur v. Price, 12 Howard, 60.
Hale v. Gaines, 22 Howard, 144.
Rector v. Ashley, 6 Wallace, 142.
Gibson v. Chouteau, 13 Wallace, 92.
Mackay v. Easton, 19 Wallace, 633, and the Hot Springs Case, 2d Otto, 712. (Rector v. U. S.)

The case in 2d Otto, rehearses the steps to be taken in obtaining and locating, on the public lands, a certificate issued by the recorder of land titles to the owner of the lands in New Madrid county, for the purpose of exchanging the lands in New Madrid county (injured by the earthquake) for government lands in Missouri or Arkansas, as follows:

"1st. Application to the recorder for a certificate that his land in New Madrid county had been injured by earthquakes.

2d. Certificate of 'location' issued by the recorder showing the amount of land to which the applicant was entitled.

3d. Application to the surveyor, presenting the certificate of location and designating the land desired.

4th. Survey and plat made by the surveyor.

5th. Return of that survey to the recorder of land titles, to be *filed* and *recorded*, with notice designating the tract located and the name of claimant.

6th. A certificate of the recorder stating the facts, and that the party is entitled to a patent.

7th. Transmissions of the certificate to the general land office.

8th. The patent."

The statute also provides that these steps shall operate as an *exchange* of titles between the United States and the owner of the damaged New Madrid lands—the title to the New Madrid lands passing, without deed, to the *United States*, and that of the located land to *the locator*.

What effect these several steps produce upon the *title* to the land asked for by the locator, and when or in what stage of the proceedings he gets any *right* to that land that could be *sold on* execution, or *when* he gets *any right* to that land that gives him a *priority* of claim *over others* asking for the *same land*, are questions *important* and *decisive* in this case. It is here I claim that the Supreme Court of Missouri erred and went wide away from the rule of construction as laid down by this court.

The court will remember that the several steps of the location of the Hunot location certificate, in in this case, by Rufus Easton, *the then owner* of the New Madrid land, were as follows: "On the 16th of

June, 1818, he applied to the surveyor of land in Missouri to have his *certificate* located on the 480 acres afterwards covered by the survey and known as survey 2,500. That on the 23d of June, 1819, the survey was made or *platted from other surveys* by the deputy surveyor who had applied, as Easton's agent, for the land. But the survey *was not returned to the office of the recorder of land titles* and recorded *till January*, 1833, fourteen years after. The sale on execution against Hammond was October 8th, 1823, under a judgment rendered *in May*, 1823, and the statute of Missouri in force at that time said: "The sale "shall pass to the purchaser all the estate the debtor "had, or *might lawfully part with*, in the lands *at the "time the judgment was rendered*" (*vide* statute in appendix to this brief). Had Easton, or Hammond under him, *any estate in or right to those lands* that he could "*part with*" May, 1823, or at any time *before*, or on October 8th, 1823? It is very plain that he could not *lawfully part with any estate which he did not have*. He must first *get an estate*, before he could be said to "lawfully part with it." It is undoubtedly true, that when New Madrid certificates first began to be located in Missouri, it was the general opinion of the locators and the lawyers that *application* and *survey* were sufficient to entitle the locator to maintain an *action of ejectment*, under the statutes of Missouri, that authorized such actions on "New Madrid locations." But after the decisions of this court in the cases of

Bagnell v. Broderick, 13 Peters, and
Barry v. Gamble, 3d Howard,

that doctrine was *abandoned* by the Missouri courts, who recognized the authority of these cases, and they afterwards held that ejectment *could not* be maintained under the statute *till the survey had been returned to the recorder* of land titles, and *by him recorded*.

For this, see

Gray v. Givens, 26 Mo. Reports, page 300.

Vide also Statute of Missouri, as to ejectment, in appendix to this brief.

The first case in this court that covered and decided *all the points in the case at bar*, as to New Madrid locations, was the case of

Lessieur v. Price, 12 Howard, 60.

It was a contest between a New Madrid locator and a grant by Congress to the State of Missouri of a number of sections of land for the purposes of a State capital, and to be selected by the State authorities. Both parties wanted the same land, and the question was which got the *first claim or lien upon it*, so as to protect it from the steps of the other party to get the same land. The opinion was by Judge Catron, who said: (Page 74.)

"The notice of location (by the New Madrid "locator) was delivered to the surveyor-general on "the 2d day of June, 1821, for the land in dispute, "and is claimed as the *inception of the title* and loca- "tion in fact, within the meaning of the law. That "it was the *mere act of the party* not having the "assent of the government must be admitted. The "Act of Congress provides, that in every case where "such a location shall be made according to the pro-

"visions of the act, the *title* of the person to the land "injured as aforesaid (by the earthquake) shall re- "vert to and become vested in the United States. "*A concurrent investiture of title must have occurred.* "*The injured land must have vested in the United* "*States* at the *same time* that the title was taken by "the new location. That it was intended to be an "*exchange of lands between the parties*, and the "question arises: When did the United States take "title?

"Was it when the application in writing was "made by the claimant to the surveyor-general to "have his land located and surveyed in a particular "place? The warrant of location certificate *issued* "from the recorder's office, and *there* it was return- "able. There the plat and certificate were returned "and recorded. That office issued the patent certi- "ficate. In that office the law required all official "business to be transacted, and not in the survey- "or's office. That the notice of the location and the "plat and certificate were recorded in the surveyor's "office, is true, and it was proper. It was not done, "however, to the end of furnishing *evidence of title* "to the claimant, but to have evidence there to "show that the land was appropriated according to "the New Madrid Act, and for the convenience of "the surveyor's department. The claimant could "not go to the surveyor's office *for record evidence* of "his location *binding* on the United States to an "exchange of lands. He could only *refer to the re-* "*corder's office*. And what was the character of the "evidence he had to rely on there? His entry was "to be made by the principal surveyor, or under his

"direction. It was to consist of a plat of survey and "a certificate describing the land and the name of "the claimant for whom the location by survey was "made. This return the recorder had to *examine*, "*pass upon and record*. If the location and survey "had been properly made, then the United States "*assented to the exchange, and not till then*. On the "6th of March, 1820, Congress provided by law for "the admission of Missouri Territory as a State into "the Union, and in that act it was enacted that four "entire sections of land should be and were thereby "granted to the State for the seat of government, "and that under the direction of the legislature these "sections should be located in one body, as nearly "as may be. The convention, on the 19th of July, "1820, accepted the grant of land. The act of the "legislature, November 16th, 1820, provided for the "permanent seat and appointed commissioners to "select a site for the seat of government. A sup-"plemental act, June 28th, 1821, extended the time "for making their report. A joint resolution, ap-"proved June 28th, 1821, required the governor to "notify the surveyor-general of Illinois and Mis-"souri, and register of lands, that the commission-"ers had selected fractional sections 6, 7, 8, the en-"tire sections 17 and 18, and so much of the north "part of sections 19 and 20 as will make the four "sections.

"An act of the assembly, fixing the seat of gov-"ernment, approved September 31st, 1821. The "act provides for laying out a town and accepts the "location. The inquiry is, the *date* the land se-"lected attached to the grant? We are of opinion

"the *acts are concurrent*, and that title took effect "from the 28th of June, 1821, *when the surveyor-* "*general was notified that the location was made*. We "state this as a matter of principle held in the case "of Landes v. Brant, decided at last term. It is "not material whether the date be the 28*th of June*, "or the 31*st of December*, 1821, when the legislature "acted. Delisle's location was filed in the record- "er's office *February* 11*th*, 1822. This is the *first* "*evidence of its legal existence* appearing of record, "and on *that day it took date*. It follows that the "legal title of Missouri is older than the equitable "title set up under Delisle's claim."

It will be noticed here, that the 28th of June, 1821, is *after* the Delisle application had been made to the surveyor-general, but *before* the survey had been made. And that the 31st of December was *after* the survey had been made, but *before* it had been returned to the recorder. So that the decision covers the *whole ground* upon which the Missouri Supreme Court put their decision in the case at bar, and *utterly destroys the position* of Judge Black, on page 213 and 214, 93 Missouri Reports, where he says: (Record, bottom of page 424 and top of page 415.) "But the act of applying to the surveyor to "locate the land in question, in satisfaction of the cer- "tificate, and the act of the surveyor in making the "plat, *were all necessary acts to procuring the patent*, "and as between Easton and those claiming under "him there *is no reason why the patent* should not "*relate back* to the *date of these acts*. It is true be- "yond all doubt that, between Easton and those "claiming under him on the one hand, and the

"*United States on the other*, there was no vested right "in Easton and those claiming under him, as "against the United States, until the surveyor re- "turned the plat to the recorder of land titles, "which was not done until 1833. *But as between "Easton and third persons*, he did acquire a "*priority* and a *right* which the *courts respect* and "*uphold and enforce*. This is clearly enough shown "in the case of Shepley v. Cowan, *supra*."

"The fact that this right was not such as to de- "prive Congress of the power of otherwise disposing "of the land, makes it none the less a *valuable right*, "and an interest in and to the land. It was a *right* "*subject to sale under execution*, for the law then said "that the sheriff's deed should be effectual for pass- "ing to the purchaser all the *estate* and interest "which the debtor had at the time of the judgment. "1 Terr. Laws, p. 120, Sec. 45."

The above extract from the opinion of Judge Black is, it is submitted, based on a misconception of the decisions of this court. The case of Lessieur v. Price, from which I have made extracts, was not between the United States and an *individual claiming a New Madrid location*. It was between *two grantees of the government*, each seeking to get the first lawful hold upon a tract of land they both wanted. This court decided that the application and survey *did not give any "priority or right"* to the New Madrid locator *over any other claimant that wanted the same land*. This court did not "respect and uphold" any such claim or right based simply upon an "application and survey;" but on the contrary, most *emphatically denied it*.

And though this court in that case distinctly recognized in its opinion the force of the "doctrine of relation," as laid down by this court in the case of Landes v. Brant, and refers to it, still the decision is that the complete title, when the patent issued on the Delisle New Madrid location, as it did in November, 1822, did *not "relate back"* to any date *earlier* than the *return of the survey to the recorder.* Therefore, the decision in Lessieur v. Price is in *direct conflict* with Judge Black's opinion in this case, and distinctly decides that the application and survey was not a valuable right, and did not give an "interest in the land." If it had, then the *New Madrid locator* would have got the land, instead of the State of Missouri.

The next case decided by this court, which clearly and distinctly covers all the material points in the case at bar, is the case of

Rector v. Ashley, 6th Wallace, p. 142.

In that case the controversy was between *individuals, Rector* claiming under the location of a New Madrid certificate, and *Ashley* claiming under a grant of land made June 22d, 1836, to the State of Arkansas, for building purposes, to be located by the State, upon any *"unappropriated lands"* of the United States in Arkansas.

The application to locate the New Madrid certificate was made on the 30th of *October*, 1820, and the survey was made *May 30th*, 1838 and returned to the recorder June 16th, 1838. The survey covered the land in dispute, and Rector claimed this loca-

tion. Ashley claimed the land by virtue of, and proceedings under, the aforesaid Act of Congress, granting to the State of Arkansas a quantity of land, not exceeding five sections, for the purpose of public buildings, to be located under the authority of the *General Assembly of Arkansas* upon "unappropriated lands" of the United States. Such proceedings were had that, on the *8th day of June*, 1838, *eight days before* the New Madrid survey was returned to the recorder, but *nine days after the survey was made* by the surveyor, the *legal title* to the land became *vested in Ashley*, under the said grant to Arkansas, *unless* it had been *previously "appropriated"* by virtue of the proceedings under the *New Madrid Act, under which Rector claimed*. Here, then, were two individuals claiming the *same land*, under *two different acts of Congress*. Rector had *made* his *application* and *got his survey before* Ashley had got *any claim* under the grant to Arkansas, but *Ashley's claim* under the Arkansas grant had *attached to the land before* the New Madrid survey had been *returned to the recorder of land titles*, and *by him recorded*.

Judge Miller delivered the opinion of the court, and said: "It seems to us that this court has al-"ready settled these questions in a manner which "leaves nothing more to be said, unless *we overrule its decisions*." He then cites Bagnell v. Broderick, 13 Peters, 436; Barry v. Gamble, 3 Howard, 32, and says: "In that case it was decided that the "return of the survey to the recorder, with a notice "of location, was the FIRST APPROPRIATION OF THE LAND." Also refers to Lessieur v. Price, 12 Howard, 60, and quotes the language of that decision.

He says: "The court in that case say: 'The injured "land must have vested in the United States at the "SAME TIME the title was taken by the new location. "as it was intended to be *an exchange* between the "parties, and the question arises, when did the "United States take title? The court holds that the "return of the survey to the recorder is ESSENTIAL to "the "*appropriation*" of the land. The rights of "the claimant are to be measured by the ACT OF "CONGRESS, and not exclusively by what he may or "may not be able to do. If a sound construction "of the act shows that he acquires no *vested interest* "in the land until the officers of the government "have surveyed it, and until the *survey is filed in "the office of the recorder and approved by him*, then, "as claimant's rights are created by the statute, they "must be governed by its provisions, whether they "be hard or lenient.' It seems to us clear," says "Judge Miller, "from the foregoing cases, that the "court intended to decide that until this was done, "the claimant acquired no VESTED RIGHT to the land; "no title, LEGAL OR EQUITABLE."

In concluding that part of the case, the judge said: "These views must dispose of the case. The "title of Ashley became a full vested title on the "8th day of June, 1838. The earliest evidence we "have of the return of the survey to the recorder "of land titles is the certificate of that officer on "the 16*th of June*, 1838. The land therefore was "'unappropriated,' within the meaning of the act "for the benefit of Arkansas, when Ashley acquired "title according to its provisions."

In these two cases of Lessieur v. Price, and Rector v. Ashley, that we have cited, it is *clearly and distinctly decided* that the New Madrid locator, by his *application* to the surveyor and the *survey made*, *does not* acquire a *priority and right* as "against third "persons, which the courts respect and uphold and "enforce," as Judge Black says in his opinion in this case. But the decisions of this court are in *direct conflict* with Judge Black's opinion. And it was upon that erroneous construction of the law that Judge Black decided this case.

The next case in this court, where the law governing the location of New Madrid certificates is *fully discussed and construed*, is the case of Mackay v. Easton, 19 Wallace, 633, 634. The opinion is by Judge Field, and the court say: "In several cases which "were before this court prior to that of Easton v. "Salisbury, it was held, as already stated, that there "could be no *effectual* appropriation of the land lo- "cated under a New Madrid certificate, *until the "survey made by the officer of the government was "returned to the recorder of land titles.* The Act of "Congress declared that where a location was made "under its provisions, the *title of the person to the "land injured* should vest in the United States. It "contemplated that there should be a *concurrent in- "vestiture of title:* that the title of the owners of the "land injured in New Madrid county should pass "to the United States, and that *at the same time* the "title to the land located in lieu thereof should pass "to the claimant, or rather the *right to the title*, for "the strict legal title did not pass until the patent

"issued, and that this exchange of title should take "place when the claimant obtained his patent cer- "tificate, or the right to such certificate, and *that* he "*could not acquire* until the *plat of the survey was* "*returned to the recorder of land titles.*

"Until the plat was placed in the public de- "pository in the territory, of evidences of title is- "suing from the United States, there was *no official* "*recognition of the proceedings taken by the claimant*, "which bound the government. It often happened "that the location made at the request of claimants "by deputy surveyors were upon lands which had "not been surveyed by the goverment, or if sur- "veyed the locations did not conform to the sectional "and quarter sectional lines of the survey."

The court below was mistaken in inferring from it only, that the locator might not get a title against *the government* till the survey was returned to the recorder, but that he could get a right that would defeat *any other person's claim*. This and the Hot Springs case (91 U. S. R.), are the only two cases upon the matter of the location of New Madrid certificates that are referred to in the opinion, and because they both happen to relate to the time when the locator gets a valid claim *against the goverment*, the judge seems to have hastily come to the conclusion that *that* was the only point in the case, and did not seem to consider how impossible it was for the locator to have a right to the land asked for, as *against all others*, and a right sufficient to *sell on execution*, as an *equity*, when he had *no right* that the government would in any way respect or acknowledge, but would sell or give the land to any other person, and

when he was also still the *absolute owner* of the New Madrid land. And furthermore, when the locator had not taken a *single step* that he could not lawfully *back out of*, whenever he pleased and retain his New Madrid land. The opinion would leave the locator the absolute owner of the *New Madrid land*, and would also give him *an equity* in the government land, *before* the government officers had made up their minds to exchange lands. Suppose the recorder had for a good reason *refused* to approve of and record the survey, *after* the land had been sold on execution as the locator's land; what would the purchaser have got then? He certainly would not have got a right that he could "lawfully sell;" as the government had not given to the debtor any right to the land he bought, *therefore* the sale would be a fraud on the purchaser.

Again, the court in the case of Rector v. United States, 2 Otto (by Justice Bradley), takes up and goes over very carefully and minutely all the points and steps to be taken in the location of a New Madrid certificate, and the *effect on the title* produced by those steps. In that case, the application to have 200 arpents of land surveyed so as to cover the *Hot Springs* was made by *Samuel Hammond and H. N. Rector* in January, 1819. The survey was made on the 16th *of July*, 1820, and was numbered 2,903. It was not approved by the recorder and recorded, because the land in that locality had not, at that time, been surveyed by the government, and it was not therefore "subject to sale" as the New Madrid statute specified. In 1822 an Act of Congress was passed (the one commented upon by

the court in the case of Mackay v. Easton, 19 Wallace, which made the location or survey *good*, if it had been then (*after* 1822 and *before* 1832), *returned to the recorder's office and approved*, as it doubtless would have been. But nothing more was done with it till *after the* Act of Congress of 1832, reserving the lands covering the Hot Springs, to the United States. In the course of the opinion, the court say: "This survey and plat did not belong, the instant "they were furnished, to the applicant, *neither did* "*the land*, until something more was done; what "was that something? The act tells us that the "surveyor *must return the survey and plat*, and the "notice as to the party for whom the survey was "made, to the office of the *recorder of land titles*, to "be by him filed and recorded. *Then, and not till* "*then*, the applicant was entitled to a patent. *Then* "*the land was first appropriated*. It then first ap- "peared on the records of the country as his. This "point *has been repeatedly adjudged by this court, and* "*has become a part of the established land law of the* "*country, and we should do great wrong at this late* "*day to shake it.*"

Further along in the opinion the court say: "The difficulty in the case is, that the survey of "1820 was *never returned to the recorder's office*, and, "*therefore, this land never became located* within the "meaning of the Act of 1815, or the Act of 1822. It "never became *segregated from the public domain*. "*It never became so appropriated to the claimants* as "to *give them a vested right*, and prevent the opera- "tion of the Act of April 20th, 1832, by which it was "reserved to the United States."

No distinction is made in any of the cases in this court, between what acts are necessary to obtain a right against the United States, and a *right against other claimants* seeking the same land, and the State court has no authority for making any such distinction. The locator got no rights *against anybody* till his survey was *recorded; then* his claim was good, equally good against the government and all others.

But the Supreme Court of Missouri did not seem to be quite satisfied to rest its decision upon that ground, but brings in the "doctrine of relation" to show that the *full title relates back* to the *first steps* taken, to-wit: The *application* and *the survey*, either, or both of them. To make the sale on execution good, the court makes the completed title relate back, either to the *application* for the survey (to-wit, June, 1818), or to the survey (June, 1819), and refers to three cases, to sustain that doctrine, viz: Landes v. Brant, 10 Howard, 373; Shepley v. Cowan, 91 U. S. 337, and Callahan v. Davis, 90 Mo. R., p. 78. *Neither of these cases had anything to do with the* law governing the *location* of *New Madrid certificates*.

The doctrine of "*relation*" is old and familiar, but is never allowed to go further back than to a substantial step in the proceeding, that gave the party taking it *exclusive rights against others*. The case of Landes v. Brant is a case with which land lawyers who have had anything to do with the old titles of Missouri are familiar, but it is no possible authority for this case. It was decided after this court had decided the cases of Bagnell v.

Broderick, 13 Peters, 436, and Barry v. Gamble, 3 Howard, 51, and had held that the application for a lot, and survey of it, in locating a New Madrid certificate, had not *the least effect upon the title.*

The case of Landes v. Brant, is briefly this: Under the treaty by which France sold the Louisiana territory to the United States, it was provided that the titles of settlers in the territory should be *respected* by the United States. By Acts of Congress of March 2d, 1805, February 28th, 1806, March 3d, 1807, a Board of Commissioners was appointed and continued in office to adjudicate the titles of the settlers that occupied lands under the French government. Those acts provided that settlers should file their claims, with evidence of their title, before said Board of Commissioners. After Clamorgan (the original settler), had filed his claim, and while it was pending before said board, his right was seized on execution against him and sold, and the sale was held to take Clamorgan's right Judge Catron delivered the opinion of the court, and said: (Pages 371, 372.) "Clamorgan's claim to the land sold had existed "for many years *before* the United States acquired "Louisiana. It had been regularly surveyed by the "Spanish government, and the survey was *filed with "the recorder*, according to the Act of 1805. Cla- "morgan had *held possession under the claim of "Dodier* (of whom he bought) to the extent of the "survey, for more than *ten years* before the 20th of "December, 1803. He was *on that day* is posses-

"sion and then a resident of Louisiana. The second "section of the Act of 1807, declares that any per- "son thus claiming and holding *shall be confirmed* "*in his title* to the tract thus held. The confirma- "tion was to be made by the commissioners, and "by the fourth section their decision was to be *final* "*against the United States.*

Long before that suit was brought, the commissioners had *confirmed* Clamorgan's claim, and the question was, to whom did the confirmation enure? The facts stated in the court's opinion show why Clamorgan had an *equity* which could be sold on execution. The sale was in 1808, under the same statute in force in 1823, when the sheriff's sale in this case was made.

The filing of such a claim by Clamorgan, under such acts of Congress, brought it within the rule governing the "doctrine of relation." Clamorgan had the *exclusive right* to that tract of land *under the law*. No one else could get it from him. The United States statute said he *should have it*, if he filed his claim and the commissioners found the facts as stated. He had occupied it for years under claim of title, and under an approved survey. His claim was good against the United States and everybody else. In the case at bar, there is no evidence that ever Easton or Hammond stepped a foot on any part of survey 2,500, but, then, there is no law requiring them to do so, to make title, under a New Madrid location.

The same judge (Catron) decided the case of Landes v. Brant that decided the case of Lessieur v. Price, and in the latter case, though he refers to

the case of Landes v. Brant as sustaining the "doctrine of relation," he decides that *that doctrine* did *not carry the title* in a New Madrid location any further back than the *return of the survey to the recorder*, thus absolutely destroying the State court's theory of this case as to the doctrine of relation in locating New Madrid certificates.

Again, the opinion of the State court cites the case of Shepley v. Cowan, as sustaining the application of the "doctrine of relation" to the facts in the case at bar. It seems to me that it is wholly inapplicable under the law as held by this court, touching New Madrid locations.

In that case, Cowan's ancestor, under whom he claimed, entered upon the land in dispute in 1835, as a "*pre-emptor*," *and did the necessary things* required by the statute to give him the *right of pre-emption*, and they *continued their possession* down to the time a patent issued to Cowan. The land at the time Cowan's ancestor entered it was *reserved from sale*, it being claimed as a part of Carondelet commons. In the Act of 1841, allowing the right of pre-emption, a grant of land (not specifically located) was made to Missouri, and certificates of location were issued by Missouri. One of these certificates was located by McPherson (under whom Shepley claimed), on the same land Cowan's ancestor had pre-empted. In 1853, an Act of Congress was passed giving to pre-emptors on land reserved from sale *the same rights*, after the land was released from reservation, as they would have had if the land had been subject to sale when they entered.

After the decision of this court in 1862, that

the land in controversy was not a part of Carondelet commons, Cowan, as Chartrand's heir, proved up his pre-emption and got a patent from the United States. McPherson also got a patent from the State of Missouri. Shepley, grantee of McPherson, filed his bill to set aside Cowan's patent. The court held (Judge Field delivered the opinion) that Cowan's pre-emption was the *initiatory step* in the title—that under the statute of 1853 he had the same rights he would have had if the land had been subject to sale when he entered as pre-emptor. To be sure, the court say in that case, that the right of pre-emption did not take from the United States the right to use a tract so settled upon for *military and other purposes*, but only gave the pre-emptor the *first and best right* to *buy* the land in preference to all others, *when* the government saw fit to sell it. Congress had given that right to the person *first entering upon the land subject to sale*, who complied with the terms of the pre-emption law. Therefore the *pre-emptor* was in *possession by law* of that *particular piece of land*, and had the *right*, by law, to *buy in preference to anybody else*. But the Act of Congress of 1815 *did not give* to the man who *first asked* the surveyor of land to survey, on his New Madrid certificate, a particular piece of land, to exchange for his damaged land in New Madrid county, a *lien on the piece of land* asked for, nor *any exclusive right* to that piece of land asked for, nor *any right* that took *precedence of all others* and gave him an *equitable title* to that piece, such as could be sold to others on execution. Neither does pre-emption give to the pre-emptor a right that can be sold on execution in Missouri, as

an equitable right, as the Supreme Court of Missouri *expressly decided* in Bray v. Ragsdale, 53 Mo. R., p. 170, and Bower v. Bigby, 9 Mo. R., p. 256.

The other case cited to sustain the "doctrine of relation," as applicable to the case at bar, is Callahan v. Davis, 90 Mo. Reports, p. 78. In that case the "initiatory point" in the title to which the full title is made to relate back, is an *entry in the land office* and *payment for the land as the law requires.* No one could well doubt, I think, that an entry at the land office and payment of the government price for a specific tract of land offered for sale, would give the man who did it a *priority* and *exclude* all other persons from getting the *same land.* That is *what is necessary* to make the full title *relate back* to that particular point.

Those are all the cases cited in the opinion in this case, to justify making the proceedings to locate a New Madrid certificate *relate back* to the *application* for the survey, or to the survey.

But in the case of Gibson v. Chouteau, 13 Wallace, on page 100, this court (speaking by Judge Field) states *explicitly* what is meant by the *doctrine of relation* when applied to the location of New Madrid certificates. This court, in that case, which also involved the location of a New Madrid certificate, overruled some notions in that particular, held by the then Supreme Court of Missouri, and in so doing said: "By the doctrine of relation is "meant that principle by which an act done at one "time is considered by a *fiction of law*, to have been

"done at some antecedent period. It is usually ap-
"plied where several proceedings are essential to
"complete a particular transaction, such as a con-
"veyance or deed. This last proceeding, which con-
"summates the conveyance, is held, for certain
"purposes, to take effect *by relation*, as of the day
"when the first proceeding was had. Thus, in the
"present case, the patent which was issued in 1862
"is said to take effect *by relation* at the time when
"the survey and plat of the location made in 1818
"*were returned to the recorder of land titles*, under the
"Act of Congress. *At that time* the title of the
"claimant to the *land desired by him had its incep-*
"*tion*, and so far as it is necessary to protect his
"rights to the land, and the rights of the parties
"deriving their interest from him, the patent is held
"to *take effect by relation, as of that date.*"

At the end of this paragraph is a star, referring at the bottom of the page to the case of Lessieur v. Price, 12 Howard—thus showing that what is here said is *in accord* with the opinion of the same court, *on the same subject*, in that case. Thus it appears that this court, in *three separate opinions*, viz: Lessieur v. Price (decided in 1851), Rector v. Ashley (decided in 1867), and Gibson v. Chouteau (decided in 1872), have *distinctly* and *directly decided* that the "doctrine of relation," in the proceedings to locate a New Madrid certificate, *does not take the completed title back to the application, or the survey*, but *no farther back than the return of that survey to the recorder and his approval and record of it. Not till then* is there a *shadow* or *shade of title* in the locator, and the State court erred when it decided that

the application or the survey, one or both, gave the locator rights *against all other persons*, which the "courts would respect and enforce."

In this case now before this court, the Supreme Court of Missouri do not *define* what they consider "an equity" that can be sold on execution, but only refer to the statute of Missouri, then in force, as to what could be sold on execution. The quotation of the statute by the court is not *literal* and does not clearly express its meaning, but it is literally cited on page of my brief and published as an appendix. That this court may see what the Supreme Court of Missouri calls "an equity" that can be sold on execution under the laws of Missouri (which in that respect have been substantially the same ever since 1807), I refer to

10th Missouri Reports, p. 403, Broadwell v. Zantis,

where there is a full discussion as to what *an equity* must be, to be subject to *seizure on execution;* and the court quotes with approval the 1st Johnson's Ch. R. p. 51, Bogart v. Perry, as follows: "The "chancellor held that a mere *naked equity* could not "be reached by an execution. There must be an "*interest* in the land which a court of law *can protect* "*and enforce*, in order that it may be subject to a "lien of a judgment and execution. A mere equity, "unaccompanied with possession, is not such an "equity."

In the case of McElwain v. Smith, 42 Mo. p. 55, the court goes over the ground and cites and approves of the case of Broadwell v. Zantis. The statute in force in Missouri when the case in 42 Mo.

was decided, said: "All real estate whereof de-"fendant or any person to his use was *seized in law* "*or equity.*"

The court says: "But if all equitable estates "and interests were subject to sale under execution, "the seller could seldom know what he was selling, "nor the purchaser what he was buying, and valu-"able property would inevitably be sacrificed, or the "levy and sale would prove utterly futile. Con-"siderations like these may justify us in confining "the meaning of the statute to its clear and express "terms." On page 55, same case, the court says: "The statute contemplates an *interest or estate* in the "land, of which the defendant or trustee, for his use, "is seized in law or equity. When there is no *such* "*seisin* of such equitable estate, there is no interest "in the land which is liable to execution."

Certainly, according to the decisions of this court, the locator of a New Madrid certificate had no such equity upon simply his *application* and *survey*.

And, further, the Supreme Court of Missouri, in the case of Bray v. Ragsdale, 53 Mo. R., p. 170 (1873), and Bowey v. Higbee, 9 Mo. R., p. 259, as before stated, have decided that a "*pre-emption* claim" was *not* such as *interest in lands* as could be sold on executions;" and the statute of the State at that time said: "All real estate whereof defendant, or any person to his use, is seized in law or equity, at the time of the rendition of the judgment,—*or at any time thereafter.*" This latter clause was not in the statute in force in 1823.

In the opinion of the court in 9th Missouri, Judge Scott said: "What is a pre-emption right? Is it an in-

"terest in land? Is it certain that the party entitled "to it will ever avail himself of it? Until he does, there "is certainly no surety that he ever will acquire any "right. What if a person entitled to a right of pre-"emption should die before proof of his right? "Will it descend? A pre-emption is nothing but an "offer by the goverment to an individual settled "upon public lands, which he *may or may not accept*. "The circumstance that the period has not arrived "when the acceptance can be signified, makes no "difference. That he will accept may be presumed, "but still, an absolute certainty that he will "accept when the time comes for acceptance *will* "*not confer* any right, till an acceptance is actually "signified in the manner prescribed by law." The judge who delivered the opinion in the 53 Missouri, above cited—quotes the above, and then says: "A "person settling upon land under a pre-emption, ev-"idently gets no title till he has complied with the "conditions of the law. If he fails to comply, then, "certainly, he has no right. Till the time arrives "when he signifies his acceptance, he surely is not "seized, *either in law or equity*, of any interest or title "in the land. Till he fulfills the prescribed condi-"tions of the law, the title remains in the govern-"ment. He may *abandon the pre-empted lands* at "any time, and then there could be no pretext that "he had either a *legal or equitable seizure*."

The above reasoning would seem to apply most forcibly to the condition of a New Madrid locator, *before* his survey is returned to the recorder and by him approved.

But in this case, there was not even a *survey*

of the land, for the bond named in the deed of Easton to Hammond was made in about three months after the *application*, and *nine months before* the survey, and as the statute in force at that time, as to what could be taken on execution (before cited), only authorized the sale of such interest as the debtor had in lands at the *date of the judgment*, and the *judgment* being dated *May*, 1823, was long *before* the *deed* of Easton to Hammond, as that was not *dated till* September, 1823, and acknowledged October *9th*, 1823, one day after the sheriff's sale.

What kind of bond it required to make an interest in the land saleable on execution, at *that time* in Missouri, may be seen from the following: In the 16th Missouri Reports, p. 149, Brant v. Robinson, the court (by Judge Gamble, one of the most able judges that ever sat upon the bench in Missouri), says: "When the parties have bound themselves by agreement to convey land and *pay for it*, "equity recognizes an interest in the land as already "in the purchaser, and the case is the stronger when "the purchaser has already paid in whole or in "part; and in either case, the interest of the purchaser may be sold on execution, upon the principle that the *vendor* is to be regarded as seized in "equity to the use of the purchaser; but if no money "has been paid, and if the person who is to become "the purchaser is not actually *under any obligation* "*to pay*, then there is *no seisin* in the seller, *even in* "*equity*, to the purchaser's use, and there is no interest in the land in him, which is liable to sale "on execution."

That is the law of the State still, and that is the

law applicable to bonds where the *obligor* is the *actual owner* of the land named in the bond. But in this case, the bond, which seems to make so great an impression on Judge Black's mind, was from a man who was not in possession and who, this court says, had not a shadow or shade of claim on the land supposed to be bonded; and there is nothing but an *inference* that the bond *related to this land*.

From all the foregoing considerations, it seems very plain that Relf and Chew got no possible interest under their execution sale against Hammond on the *8th of October*, 1823. They bid for it, one hundred dollars only, when it was about the same time sold by Easton to Hammond for near $1,600, who, though he got no title then, got a *full warrantee deed*, which gave him the *equitable title through Easton*, when the survey was returned to and approved and recorded by the recorder of land titles in 1833. But a *sheriff's deed* gives no *after-acquired title*.

We believe we have stated as plainly as possible the reasons why the *first error* assigned by the plaintiffs in error, should be, *sustained*, and the *judgment reversed*.

The *second error* assigned is, that the Supreme Court of Missouri held that the patent issued to "Joseph Hunot or his legal representatives," *dated* August 30th, 1859, took the *fee out of the United States on that day*, so as to set the statute of limitations running in favor of the defendants as disseizors, *instead* of on the 12th *day of November*, 1860, the day on which the Secretary of the Interior *decided that a*

patent should issue. This matter depends upon the construction to be given to *three papers* issued by the land department. These papers are in the record. (Pages 180, 298, 299, 300.)

The question is not here, what it was in the case of United States v. Schurz, 12 of Otto, 373—whether or not a patent is operative *before delivery*. But the question is, does it operate from *its date*, to take the title out of the United States, more than a year *before* the land department *have decided to issue it*, so as to set the *statute of limitations* running in favor of a *disseizor against the owner* of the land *from its date?*

The first paper (record, page 181), is a letter from the acting land commissioners to the President's secretary for *signing patents*, dated August 30th, 1859 (*the same date as the patent*), requesting *his signature* "to the patent as recorded, Vol. 2, pages "405 to 413, inclusive, in favor of Joseph Hunot, or "his legal representatives."

By this letter it appears that the patent was *written out, dated and recorded before* it was signed by the *President*. It was then certainly not a patent when it was *dated and recorded*, as the *President had not signed it*. *When* the President signed it *does not appear*. It might have been a *day* after, or *four months*, as the next time we hear of it is in a letter dated April 6th, 1860.

On that day the Commissioners of the general land office wrote to the recorder of land titles at St. Louis (record, page 298), a letter in which he commences by saying: "This office has *drawn up a* "*patent* for what is known as the Hunot New Madrid

"claim, etc. But looking to the fact that in the "papers received with Surveyor-General Lough- "borough's report of the 10th of February, 1859, "the *opponents to the survey* either contemplated or "proposed to seek by appeal the *highest executive* "decision in the premises, the case was *submitted to* "*the Honorable Secretary of the Interior on the* 22d *of* "*December*, 1859, *for his revision, etc.*"

Then the recorder is requested to notify those *opposing* the patent that they must enter a *formal appeal* on or before the *seventh of May*, 1860, or the patent would be sent to the recorder for delivery. An appeal *was taken* in due form *within* the time specified.

Now, by this letter, it appears that a patent had been *drawn up* by the land office, and, *of its own motion, sent by that office to the Secretary of the Interior* for his "*revision*," etc., on the 22d of *December*, 1859. Certainly it was not then a *completed patent* to take the title out of the United States. It was before the Secretary of the Interior for his "revision" by the *action of the land office itself*. Now, if the patent had not taken effect, to take the title out of the United States *before* it was sent to the Secretary of the Interior for his "revision," etc., on the 22d of December, 1859, *then* the statute of limitations *does not* cut off the title of the Hammond heir who resided a part of the time of the rebellion in *Tennessee; because* the proclamation which declared Tennessee *in rebellion* was dated *August* 16th, 1861, and the first proclamation declaring some of the States in rebellion was *April* 19th, 1861, and the proclamation declaring the war *ended* was April

2d, 1866. So that, if the patent was not operative to take the title out of the United States *before it was sent by* the land office to the Secretary of the Interior for his "*revision*," *etc.*, the statute of limitations *does not* cut off the Hammond heir who was in Tennessee, when the war commenced in other States. As Tennessee was declared by proclamation to be in rebellion in a little less than *four months after* the date of the first proclamation, and as the date of sending the patent to the Secretary is *over four* months *after* the date of the patent, the statute of limitations had not run *ten years* from *December 22d*, 1859 (when the patent was sent to the Secretary of the Interior), *before* this suit was brought. But how can it be that a patent merely *prepared in form* and held up for over a *year afterwards*, for the *consideration of the land department*, can operate from *its date* against the patentee and in favor of a *disseizor?* If the Secretary of the Interior had *refused* the patent, then certainly there would not have been one, and the disseizor would not have got the land by *adverse possession*. The secretary held the patent *eleven months after* the land commissioners sent it to him, before he decided that it *should issue;* if he had held it *eleven years*, and *then* delivered it, and it took effect from its date, then the patentee would not have had *any land*, because *ten years' adverse possession* in Missouri gives title equal to *a deed*. On the 12th of November, 1860, the Secretary of the Interior gave an elaborate opinion that a patent should be granted to the legal representatives of Joseph Hunot. The opinion is in the record (page 298 and following). The plaintiffs

in error therefore say that, on *that day*, the patent took effect, and *not before*. In the case of United States v. Schurz, 12 Otto, before cited, the court said: "To the officers of the land department, "*among whom we include the Secretary of the Interior*, "is confided the sale of the public domain. It is clear "that the right and duty of deciding such questions "belong to those officers, and the statutes have *pro-* "*vided* for *original and appellate jurisdiction* in that "department before the successive officers of higher "grade up to the Secretary. They therefore have "jurisdiction in such cases, and provision is made "for the correction of errors in the exercise of that "jurisdiction."

We say, therefore, that from the papers coming from the land department, it plainly appears that the department had *never come to the conclusion* to issue a patent in said location *till November 12th*, 1860. Up to that time it was *under consideration* in that department, and it could not be a patent *before* that department had *finally passed* upon the question before it. It could not take effect from its *date*, for it was *dated and recorded before* it was *signed* by the President, and *when* he signed it we do not know; it may not have been signed till the day it was sent to the Secretary of the Interior. The land commissioners' office did not determine it to be a patent, *because* they say on the 22d of December, 1859, they had sent it to the Secretary of the Interior for *his* "*revision, etc.*"

If it was a patent *at its date*, then the Secretary of the Interior had no *jurisdiction over it*, because *he* cannot *annul a patent*.

It has then passed *his jurisdiction*, and could only be annulled by the decree of a court of equity. If it was a patent *before* November 12th, 1860, then the Secretary of the Interior was debating a question over which he *had no jurisdiction*. Even *he* has no power to make a patent *operative* a year or fifteen months *before* it *was a patent*. That would make him almost omnipotent.

The defendants' favorite "doctrine of relation" don't help the case any, as *that* only takes the title back to some *necessary preliminary and exclusive step*, as a *sale on execution before* the date of the sheriff's deed.

But the date of the patent is not a *necessary, preliminary* step, as it should have been the *very last thing done*, and done *after* the *land department, including* the Secretary of the Interior, had *determined* that it should issue.

We respectfully submit, therefore, that the *second error* assigned by the plaintiffs in error should be held to be an error, and the judgment reversed for that also.

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APPENDIX TO PLAINTIFF'S BRIEF.

The territorial statutes of Missouri, Vol. 1, p. 120, Sec. 45, enacted in 1807, say: "Where lands and tenements shall be taken in execution by the sheriff, it shall be his duty to expose the same to sale at the court house door on some day while the courts of common pleas or quarter sessions in the district are in session, having previously given *twenty days' notice* of the time and place of sale, and what lands and tenements are to be sold, and where they lie, by at least six handbills affixed in the most public places in different parts of the district.

And upon such sale, the sheriff shall make return of the writ, together with a copy of the advertisement put up as aforesaid, and give the buyer a deed duly executed and acknowledged in court, for what is sold, which deed shall recite the execution, purchaser and consideration, and shall be effectual for passing to the purchaser *all the real estate and interest which the debtor had or might lawfully part with in the lands at the time the judgment was obtained.*"

The above statute remained in force till repealed by the Revised Statutes of Missouri, February 21st, 1825, page 500, Sec. 13.

The statute, as to ejectment, in force in Missouri when the Supreme Court of that State recognized the controlling power of the United States Supreme Court, as to what constituted a "*New Madrid location*," was the Revised Statutes of 1835, which said:

1st. "The action of ejectment may be maintained in all cases when the plaintiff is legally entitled to the possession of the premises.

2d. "The action of ejectment may also be maintained in all cases where the plaintiff claims the possession of the premises, against any person not having a better title thereto, under or by virtue of:

1st. "An entry with the register and receiver of any land office of the United States, or with the commissioner of the general land office thereof; or,

2d. "A pre-emption right under the laws of the United States; or,

3d. "*A New Madrid location;* or,

4th. "A confirmation made under the laws of the United States; or,

5th. "A French or Spanish grant, warrant or order of survey, surveyed by proper authority, under French or Spanish governments, and recorded according to the usages of the country, prior to the tenth day of March, eighteen hundred and four."

The statute of Missouri, on ejectments, has remained substantially the same to this day, and *exactly the same* as to "*New Madrid locations.*" That phrase is used in all the statutes.

The statute of Missouri, in force when the case of McIlvain v. Smith, 42 Mo. R. p. 55 (cited in plaintiff's brief), was commenced—were the Revised Statutes of 1855, and the opinion in that case, of course, refers to the statute of that date—Vol. 1, pp. 740 and 753, Secs. 17 and 73.

"Section 17. The following property shall be liable to be seised and sold *on execution* issued upon a judgment, order or decree of any court of record." After reciting various kinds of property, it says:

Fifth. "All real estate whereof the defendant, or any person for his use, was seized *in law or equity*, on the day of the rendition of the judgment, order or decree, whereon execution issued, *or at any time thereafter.*"

Section 73. "The term real estate, as used in this act, shall be construed to include *all estate and interest in lands, tenements and hereditaments.*"

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1891.

DAVID L. HAMMOND *et al.*,
Plaintiffs in Error,

vs.

WALTER S. JOHNSTON, Receiver of the National Bank of Missouri, and CLARA A. BAKER,
Defendants in Error.

No. 114.

GEO. F. EDMUNDS,
D. J. JEWETT,
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Attorneys for Plaintiffs in Error.

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Defendants in Error.

The attorneys for defendants in error have, for the last three years, been saying they would file a motion in this court to dismiss the above entitled cause for want of jurisdiction in this court, and for answer to such motion the following brief for plaintiffs in error is submitted. The record in this case, now printed, and the brief prepared on the general merits of the case, sufficiently set out all the

facts of the case. For the purpose of understanding this motion to dismiss, it will be sufficient to state the following facts: In April, 1816, Rufus Easton became the owner in fee of a certain tract of land in New Madrid county, Missouri, which land was formerly claimed and occupied by Joseph Hunot, before the purchase of Louisiana, and which was injured by earthquake in 1811–12.

Under the provisions of the Act of Congress of February 17th, 1815, commonly known as the New Madrid Act (United States Statutes, Vol. 3, p. 201), certificate No. 161 was issued to "Joseph Hunot, or his legal representatives," under the provisions of said act. (*Vide* Record, page 23.) Rufus Easton, as the owner of the New Madrid land, and therefore lawful holder of said certificate, in June, 1818, asked the surveyor of lands in the territory of Missouri to have said certificate located on part of fractional section 17, fractional section 18, and so much of the east side of fractional section 8, in township 45, N. R., 7 east (the township in which St. Louis is situated), as would make 480 acres. (Record, page 24.)

In June, 1819, said land was, by Deputy Surveyor Jos. C. Brown, either surveyed or platted from other surveys, and afterwards became known as United States Survey 2,500, for "Joseph Hunot, or his legal representatives." (Record, page 25.)

This survey, however, was not returned to the recorder of land titles and *recorded* till January 8th, 1833. (Record, bottom of page 26.)

In May, 1823, Relf and Chew and Mary Clark, as executors of Daniel Clark, recovered a judgment

in the Supreme Court of Missouri against Samuel Hammond, the grandfather of most of the plaintiffs. An execution was issued thereon for over six thousand dollars, and on the *5th of September*, 1823, the sheriff (Walker) seized sundry tracts of land as the property of Samuel Hammond and advertised the same to be sold on the *8th of October*, 1823. Among them was "a tract of 240 arpents, west of St. Louis, bounded south by land of Gratiot and Philipson, west by land of Cabanne, and east by land of Stokes and others." All the tracts so advertised were sold on the said *8th of October*, 1823, and were bid in by Relf and Chew, the plaintiffs in execution. The sheriff made a deed of the same to them. The sheriff's deed, in its description of the land, is substantially the same as the descriptions in his advertisement. (Record, page 31.)

By a full warranty *deed*, dated the *29th of September*, 1823, and acknowledged by Easton and wife on the *9th of October*, 1823, Easton and wife conveyed to Samuel Hammond *two hundred and forty acres* of land, and the *whole* of the following tract, except two hundred and thirty-four acres of land of the said tract conveyed to William H. Ashley (admitted to be a mistake for Stokes), to-wit: "Four hundred and eighty acres of land described in the following entry: 'Rufus Easton, "as the legal representative of Joseph Hunot, enters four hundred and eighty acres of land by "virtue of certificate No. 161, issued by Frederick "Bates, Esq., recorder of land titles, to-wit:'" (Here he describes the parts of sections as in his application.)

As a *consideration for this deed*, he says: "That Rufus Easton and wife, for and in consideration of the sum of fifteen hundred and eighty-three dollars, to him in hand paid by the said Samuel Hammond, and pursuant to the conditions of a *certain bond executed by the said Rufus Easton* to the said Samuel Hammond and James I. Wilkinson, dated 3d of September, 1818, they, the said Rufus Easton and wife, do, by these presents, grant, bargain, sell," etc., etc.

Nothing is known of any such bond except as referred to in said deed.

The foregoing represents all the title Hammond ever had.

Relf and Chew made no conveyance of the two hundred and forty acres so bid in by them at sheriff's sale, till March, 1840, when it was sold by them to Peter Lindell, by quitclaim deed, and by the same description as was in the sheriff's deed to them. The record shows that Peter Lindell had then been in possession of the land for about ten years. (Record, page 67, near the bottom.) Peter Lindell occupied said land till he died, in 1861, and then, in the partition of his large estate, the lot here in controversy (ten acres of that 240), was set off to one of his nephews, viz., Levin H. Baker, who conveyed it to his wife, Clara Baker, the defendant, and from them by deed of trust foreclosed to the National Bank of which the defendant Johnson is the receiver. Hammond never made any conveyance of the land, but left Missouri about 1824 and went to South Carolina, and died there in 1842. The original plaintiffs, and now plaintiffs in

error (with the exception of J. L. D. Morrison), are his direct descendants, and mostly grandchildren. Morrison claimed an interest by deeds from them. A patent *dated* August 30th, 1859, and ordered to be issued by the Secretary of the Interior, *Nov. 12th*, 1860 (Record, pages 298, 299, 300), took the fee out of the United States. Also, an act of Congress, dated June 30th, 1864, released to Joseph Hunot, or *his legal representatives*, all the right, title and interest of the United States in and to United States Survey 2,500, in the name of Joseph Hunot or his legal representatives. (United States Statutes, Vol. 13th, p. 581.)

On the trial of this case, the plaintiffs in error asked the trial court to give the following instructions (Record, p. 397):

"No. 11. The court is requested to declare the "law to be, that, under all the documentary evi- "dence in the case, there was in 1823 no *legal nor* "*equitable title* in Samuel Hammond to any part of "the land in what is known as United States Sur- "vey No. 2,500, in the City of St. Louis, and for "that reason (having no reference to any other), no "title, legal or equitable, to any part of said land, "was acquired by the purchasers under the levy "and sale by Sheriff Walker, on execution against "said Hammond, in September and October, 1823, "as put in evidence by defendants in this case."

This instruction was *given by the trial court*, but was *overruled* by the Supreme Court.

The defendants asked the trial court to give, and that court *gave* the following instruction (Record, p. 399):

"No. 14. When the patent to Joseph Hunot, "or his legal representatives, read in evidence by "defendants, was issued, the same related at least "*as far back as the time of the passage of the Act of* "*Congress of April 26th*, 1822, if not to *June 23d*, "1819, which is the time the *field survey* was made "of the land for which said patent was issued."

This instruction was *given* by the trial court, and was *sustained* by the Supreme Court of Missouri, as appears by their opinion.

Thus it appears that the *vital* question at issue, fatal to one side or the other, is the proper construction and meaning, the force and effect, *of the Act of Congress of February 17th*, 1815, before referred to, and known as the New Madrid Act. That is to say, whether or not there was on the 8th day of October, 1823, any title out of the United States by virtue of the provisions of said act, that would be called *an equity* under the laws of Missouri, and subject to sale on execution.

It also fully appeared by the opinion of the Supreme Court of Missouri, that in giving judgment *against* the rights claimed by the plaintiff in error, *under the said New Madrid statute*, they *construed* the force and effect of that statute, and *denied* to the plaintiffs in error the *right they claimed under it*, and, as plaintiffs allege, *misconstrued* said statute so as to give rights to the defendants in error under it, to which they were *not entitled* under the provisions of said law. The part of the opinion relating to this matter is more particularly set forth on p. 413 of the printed record, where the court holds, that under the operation of the New Madrid Act, and

by the application and survey only, or even by the application only, a *right* was acquired in and to the land asked for, which was good against *all other persons*, and was an equitable right or title, such as would be *sold on execution* as an equity, and thus give to the purchaser the *completed title* to the land, when the patent was issued under the provisons of said Act of 1815. This is denied by the plaintiffs in error, who claim, that this erroneous construction deprives them of their rights under the statute, and brings the case very clearly within the rules of law as laid down by the court, governing its jurisdiction. Exactly *when* and *how* the rights so claimed got into Hammond, the Supreme Court of Missouri do not distinctly state, but *seem* to hold, that the *application* to the surveyor-general, and the bond named in the deed of Easton to Hammond, were sufficient for that purpose, though the date of the bond was only three months after the application.

The case of Murdock v. The City of Memphis 20th Wallace, p. [illegible], is considered a leading case upon the question of jurisdiction, and in that case this court says (p. 637): "Plaintiffs claim a right under an act of the United States which was decided against them by the Supreme Court of Tennessee, and this claim gives jurisdiction of this court." Of course, the *right claimed* must involve the construction of a statute of the United States, etc., etc. The plaintiffs in error claim a right to this land under the proper construction of the before-named New Madrid statute.

In the case of Rector v. Ashley, 6th Wallace,

142, this court has fully recognized the claim we make, that this court has jurisdiction in this case. The court in this case (by Justice Miller) said: "This title (claimed by Rector) was dependent upon the Act of Congress of February 17th, 1815, for the relief of the inhabitants of New Madrid, who had suffered by earthquakes, and the decision was *against* the claim set up by him under that statute. It is, therefore, a proper case for a writ of error under the 25th section of the judiciary act." (The 25th section was, in the old act, on this point, the same as the present act.)

The *right* claimed by Rector was, that his *application and survey* gave him a *lawful claim* on the land *before* the claim of Ashley (under a grant of *unappropriated* land to Arkansas) attached to the land that he (Rector) asked for. That claim by Rector gave the court jurisdiction, because it involved the *construction* of an Act of Congress, and the Supreme Court of Arkansas had decided against his claim, to-wit: that his *application* and *survey did not* give him any claim or right to the land he asked for.

So, also, in the case of Lessieur v. Price, 12 Howard, the same question arose. Lessieur claimed under the provisions of the same Act of Congress of *February, 17th*, 1815, and Price claimed under an Act of Congress granting a certain number of sections of land to Missouri, to be selected by the State, for the location of its capital. The decision below was against the claim set up under the New Madrid law.

This court (on page 73—at top) say: "Both "sides claim title under Acts of Congress; on the "construction of these, and the facts calling for a "construction, the controversy throughout depends, "and therefore this court has unrestricted power to "adjudge and conclude the controversy."

"Plaintiff claims title under a New Madrid cer- "tificate, and the defendant under an Act of Con- "gress granting to the State of Missouri a tract of "four sections, to the end of locating the seat of "government."

In the case at bar *both parties* claim under the same Act of Congress, but by a *different construction* of the same act, and this court clearly has the jurisdiction to decide which party has the better right.

The case of Gibson v. Chouteau, 13 Wallace, p. 92, is perhaps still more in point.

The jurisdiction of this court rested, in that case, wholly upon the provisions of the New Madrid Act. That was a writ of error by Gibson out of this court to the Supreme Court of Missouri, where he claimed title to a tract of land, under the location of a New Madrid certificate, and a patent issued thereon, as provided by said act. The defendant, Chouteau, claimed title by *adverse possession*, under the laws of Missouri, and the Supreme Court of that State decided in favor of defendant Chouteau. The jurisdiction of this court was not called in question, and this court *reversed* the decision of the State court, and held that adverse possession, under State laws, could not affect the title till after the fee was out of the United States, and also decided that the patent did *not relate back* to affect the title at any

time *before* the survey, required by the New Madrid Act, was *returned* to the recorder of land titles, and by him recorded.

These cases would seem to be decisive, and we will not cite any more, as this court must, of course, be very familiar with the question of its jurisdiction.

Even the Supreme Court of Missouri, in its opinion (*vide* middle of page 430) fully recognizes the right of this court to *review* the opinion given in this case by that court.

The other error assigned in this case cannot be otherwise than within the jurisdiction of this court, to-wit: as to when the patent, issued in this case, took the fee out of the United States, whether at the *date* of the patent, or when the Secretary of the Interior passed upon the question on appeal, some fifteen months *after the date*, as to *whether or not it should issue*. But as *that* question is not of much importance, unless the writ of error is sustained on *the other point*, it need not be further discussed.

GEO. F. EDMUNDS,
D. J. JEWETT,
HENRY H. DENISON,
For Plaintiffs in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 114.

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v.

WALTER S. JOHNSTON, RECEIVER, &C., DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

J. B. HENDERSON,
For Defendant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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IN ERROR TO THE SUPREME COURT OF MISSOURI.

STATEMENT OF THE CASE.

Joseph Hunot was the grantee of a head-right of 800 arpents of land, made in 1802, under the Spanish government, located in what is now New Madrid county, Missouri.

On May 12, 1810, he conveyed, by deed, this land to Joseph Vandenbenden.

On November 4, 1815, Vandenbenden conveyed the same to Rufus Easton.

On January 31, 1811, the claim was presented for confirmation to the old board of commissioners and rejected.

On November 1, 1815, Recorder Bates recommended this

claim for confirmation, and it was confirmed by act of April 29, 1816, to Joseph Hunot.

On August 12, 1816, Recorder Bates issued his certificate (No. 161), stating that this land, "which appears from the books of this office to be owned by Joseph Hunot," had been injured by earthquakes, and that under the act of February 17, 1815, Joseph Hunot or his legal representatives were entitled to locate 480 acres of land.

On June 16, 1818, Joseph C. Brown, for Rufus Easton, made application to the said surveyor general to locate the said certificate on certain lands in township 45, range 7 east.

On June 23, 1819, Joseph C. Brown, United States deputy surveyor, returned to the surveyor general's office a plat and description of the 480 acres surveyed for Joseph Hunot or his legal representatives. Said survey is numbered 2500, and the field-notes place Gratiot and Emilien Yostey on the south, Hebert on the west, and Conway on the east. Phillipson subsequently purchased the Yostey tract, and John P. Cabanne purchased the Hebert tract, and Stokes purchased the Ann Camp tract, and they occupied their respective tracts in 1823.

This survey was returned to the recorder of land titles on January 8, 1833, and on February 2, 1833, Frederick Conway, the recorder, issued and delivered to Peter Lindell patent certificate No. 404 for said survey 2500 in the name of Joseph Hunot or his legal representatives.

On July 10, 1819, Rufus Easton and wife, by deed of that date, conveyed to William Stokes two hundred and thirty-four acres of this survey, described particularly by metes and bounds, and "being part of a location of 480 acres made by virtue of a New Madrid certificate issued by the recorder of land titles for the Territory of Missouri in the name of Joseph Hunot or his legal representatives, and which the said Rufus Easton owns by virtue of a deed to Joseph Vandenbenden, and Vandenbenden to the said Rufus Easton."

On September 29, 1823, Rufus Easton, by deed of that date, in which he recited that he had previously, to wit, on September 3, 1818, executed his title bond to Samuel Hammond and James J. Wilkinson for the same land, conveyed to Samuel Hammond 240 acres of land, it being the whole of the Hunot survey as located by Rufus Easton by virtue of certificate No. 161, except 234 acres of said tract which he had conveyed to *William H. Ashley* by his deed of 1819. It is agreed that "William H. Ashley" is erroneously used for "William Stokes."

Samuel Hammond occupied, fenced, and cultivated this land between 1818 and 1823. In 1824 or 1825 he left St. Louis, largely indebted both to individuals and to the Government, and returned to South Carolina, where he continued to reside until 1842, when he died, leaving five children. One of these children, Mary A. Washington, is still living in Macon, Georgia. The other children have died, leaving heirs, who have resided in the Confederate States since Hammond's death.

On the 12th day of March, 1819, Richard Relfe, Beverly Chew, and Mary Clark instituted their suit against Samuel Hammond in the St. Louis district court for $7,500, which, after various proceedings, resulted in a judgment against Hammond, on personal service, for the sum of $6,877.43½. This judgment was first rendered at the August term, 1819, and, after writ of error, was finally affirmed by the superior court at the May term, 1823.

An execution was issued on this judgment, dated May 23, 1823, and delivered to John K. Walker, then sheriff of St. Louis county, by virtue of which said sheriff levied upon and seized as the property of Samuel Hammond "a tract of land containing 240 arpents, more or less, bounded on the south by Gratiot and Phillipson, on the west by land of John P. Cabanne, and on the east by land of William Stokes and others."

After proper advertisement, beginning on September 5,

1823, this land was sold by the said sheriff on the 8th day of October, 1823, when Richard Relfe and Beverly Chew, being the highest and best bidders for the same, became the purchasers thereof; whereupon the sheriff executed his deed to said purchasers in due form of law, dated the 4th day of November, 1823. This deed was duly acknowledged on the day of its execution in open court by the said sheriff, and a record thereof made upon the record books of said district court, and a certificate of said acknowledgment, as required by law, is endorsed on said deed by Archibald Gamble, the clerk, purporting to be under his hand and seal of office, on January 27, 1824. This deed was recorded in Book K (L), page 481, of the records of St. Louis county, on January 27, 1824.

Relfe and Chew, the purchasers, executed a letter of attorney, dated October 19, 1838, and recorded March 28, 1840, to John O'Fallon, by which they authorized O'Fallon to sell and convey said lands for them.

Relfe and Chew, by John O'Fallon, their attorney-in-fact, by deed dated March 20, 1840, and duly recorded March 28, 1840, conveyed to Peter Lindell the said land, described as follows: "Containing 240 acres, be the same more or less, and described in a deed from John K. Walker, then sheriff, to said Relfe and Chew, bearing date November 4, 1823, on record in said county in Book K, p. 481, as bounded on the south by land of Gratiot and Phillipson, on the west by land of John P. Cabanne, and on the east by land of William Stokes and others, and includes the big spring known by the name Hammond spring, and being part of a location of 480 acres made by Rufus Easton as the legal representative of Hunot, and more particularly described by reference to the certificates of Joseph C. Brown, formerly sheriff of St. Louis county, recorded in Book K, page 397."

Joseph Hunot and wife, by deed dated December 5, 1834, conveyed for value said land to Peter Lindell, which deed was duly recorded December 22, 1834.

Peter Lindell, having previously purchased that part of the location conveyed by Easton to Stokes, took actual possession of all of said lands, and continued to hold such possession openly and notoriously for himself and against all others up to the period of his death, which occurred in 1861. He left heirs, who continued in the same manner to occupy said land until partition of the same was made between them, after which each heir occupied and possessed his respective interest.

Lindell, his heirs and representatives, have at all times since claimed title to this land, and have held possession thereof under and by virtue of the said sheriff's deed executed by Walker to Lindell in 1823.

On August 30, 1859, on the application of Lindell, a patent was issued by the United States, and recorded in the General Land Office on that day, conveying the said survey 2500 to Joseph Hunot or his legal representatives. The lot in controversy is on this survey.

The Government officers in all their transactions and in all their correspondence since 1840 touching this survey have recognized and treated Peter Lindell as the legal representative of Joseph Hunot, and the patent was delivered to him.

Previous to 1845 the St. Louis public schools set up a claim to these lands under the act of June 13, 1812. It was claimed that the land in controversy constituted a part of the Grand Prairie common-field lots of St. Louis, and that it was reserved for the public schools, and therefore not subject to location under the New Madrid certificate.

Peter Lindell thereupon purchased of said schools their interest in said land and took a deed therefor, dated August 30, 1845, which is in evidence in this case.

From these facts it was insisted by the defendants in error that if the patent to Joseph Hunot or his legal representatives inured to Samuel Hammond as a purchaser from Easton, it passed to Lindell by virtue of the sheriff's deed.

If the confirmation of the Spanish grant should be held not to have passed from Hunot, then his deed of December 5, 1834, passed the title of the newly located land to Peter Lindell. If, on the contrary, the land on which the New Madrid certificate was located was at the time reserved from sale by the act of 1812, the title was relinquished by the United States to the State of Missouri for the support of schools by the act of January 27, 1831 (4 U. S. Stat., 435), supplemented, as it was, by the act approved June 15, 1864, which provided that all the right, title, and interest of the United States in and to all the lots, tracts, pieces, and parcels of land in the Grand Prairie common fields of St. Louis "which have not heretofore been disposed of by the United States shall be, and the same hereby are, granted, relinquished, and conveyed in fee simple to the State of Missouri for the support of schools in said township" (the same in which St. Louis is situated).

These acts of Congress were followed by an act of the legislature of Missouri (Session Acts 1879, p. 197) transferring to the school board of St. Louis all the right, title, and interest which the State acquired by virtue of said acts.

In a similar case (Bowlin *v.* Furman, 28 Mo., 427) the supreme court of Missouri held that a similar relinquishment of land by the United States to the use of schools, which was reserved for that purpose by the act of 1812, related back to that act and inured to the use of the grantee, who held under a quitclaim deed dated in 1851—previous to the time of the relinquishment.

Samuel Hammond became heavily involved in debt between 1820 and 1825 at St. Louis and returned to South Carolina. In July, 1823, a suit was begun against him by the United States in the United States district court of St. Louis for moneys received by him as agent for the Government, and on the 9th of September, 1824, a judgment was rendered against him for $26,680.35, on which execution was issued October the 9th, 1824. On March the 7th, 1825, this

execution was returned by Henry Dodge, marshal, as follows: "The within-named Samuel Hammond has no lands and tenements, goods or chattels, in my district that I can find whereon to levy and satisfy this execution or any part thereof; neither is the body of said Hammond to be found in my district."

On an *alias* writ to South Carolina Hammond was arrested, and on the 21st day of February, 1826, he made application to the President of the United States asking to be discharged from imprisonment under the insolvent laws of the United States.

As required by law, he furnished a schedule of all his property—real, personal, and mixed—and offered to convey the same to the United States; whereupon the President entered upon the petition and schedule the following indorsement:

"Let the petitioner be discharged after making the assignment to the United States of his property as offered in the petition."

Whereupon Mr. Hammond conveyed, assigned, and transferred all the property, real and personal, contained in the schedule to the United States, as required by law, the deed being dated March 13, 1826. In his application for discharge he uses the following words: "*That he hath no other property than that in the State of Missouri and in Arkansas and Illinois, a schedule of which is annexed to this petition*, and that he is willing and ready to assign the same to the United States." He disclaimed owning any land in the Hunot location.

On page — will be found a register of this judgment, with an abstract of the correspondence between the United States district attorney at St. Louis and the Treasury authorities in regard to its collection, and saying that nothing could be realized from the property transferred in the assignment.

In the partition of the lands included in the Hunot loca-

tion among the heirs of Peter Lindell between 1860 and 1870 the land in controversy was allotted to Levin H. Baker, one of the heirs, and he conveyed the same to his wife, Clara Baker, who afterwards conveyed it, by deed of trust to secure a loan of money, and it was sold under said deed for

a. The plaintiffs in error derive their claim to the land through conveyances made in 1873-'4, by persons professing to be the descendants of Samuel Hammond, to whom they paid, as shown by the deeds, the sum of $1,330 for 240 acres of land, lying in the city of St. Louis, worth from five thousand to twenty-five thousand dollars per acre.

It is claimed, *first*, that the court committed error in holding that the sheriff's deed of 1823 transferred to Relfe and Chew, the purchasers, any title, legal or equitable, to the land in controversy. It is urged that the survey of the New Madrid location, though made and returned to the surveyor general's office in 1819, was not returned to the office of the recorder of land titles till January 8, 1833, and that therefore Hammond had no interest in the land which could be transferred or assigned at the date of the sheriff's deed.

And, *second*, that error was committed in deciding that the patent to Joseph Hunot or his legal representatives dated and recorded August 30, 1859, though not delivered until 1860, took effect from its date, by which error it is said that Samuel E. Hammond, one of the plaintiffs, who lived in Tennessee, where the war did not commence till August 16, 1861, was erroneously held to be barred.

Motion to dismiss or affirm.

On this state of facts the defendants move the Court to dismiss the plaintiffs' writ of error or affirm the judgment of the supreme court of Missouri for the reasons following :

First. The record fails to present any Federal question decided against the plaintiffs by the supreme court of Missouri; and—

Second. Should this Court hold that a Federal question is involved in the judgment of the supreme court of Missouri, the defendants insist that it was properly decided by said court.

Brief and argument.

The writ of error must be dismissed unless it appear that, in the judgment of the supreme court of Missouri, there was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against its validity; or unless there was drawn in question the validity of a statute of or an authority exercised under the State of Missouri, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity; or unless some title, right, privilege, or immunity was claimed by the plaintiffs in error under the Constitution or treaties or statute of or commission held or authority exercised under the United States, and the decision was against the title, right, privilege, or immunity specially set up or claimed by the plaintiffs under such Constitution, treaty, statute, commission, or authority.

The Constitution of the United States (art. 3, sec. 4) provides that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

The only pretense on which error can be claimed is that the judgment of the Missouri court in some way conflicts with this provision of the Federal Constitution and interferes with the disposition of its lands by the Government.

It is needless to refer to the second error complained of touching the ruling in respect of the statute of limitations.

If the decision sustaining the sheriff's deed be correct, not only one but all the heirs of Hammond are precluded from setting up any interest in the land, and plaintiffs have no, standing in this Court.

"Where the supreme court of a State in rendering a judgment decides a Federal question, and also decides against the plaintiff in error on an independent ground not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question."

Hopkins *v.* McClure, 133 U. S., 380.

I.

Both plaintiffs and defendants claim under the same patent. No right claimed under the Constitution or laws of the United States is here drawn in question. The only controversy was and is whether, under the laws of Missouri, the title which emanated from the United States passed from one person to another under a deed executed in accordance with the State law. That is a subject for State and not Federal jurisdiction. This Court adopts the local law of real property, as ascertained by State decisions, whether those decisions are based on the construction of the local statutes or form a part of the unwritten law of the State.

II.

The party who takes the initiatory steps to procure a title from the United States, if followed up to a patent, is deemed to have acquired the better right, as against others, to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants; and the intermediate *bona fide* alienee of such incipient interest may rightfully claim that the patent when issued inures to his benefit.

III.

While it is true that, as between the patentee and the alienees of his inchoate title, the patent when issued relates back to the *first* necessary step in the acquisition of title, yet, as between the patentee or his legal representatives and the United States, no vested interest passes from the Government until all the steps are taken which are necessary to create the right in the applicant to demand the patent and the obligation of the Government to issue it.

In the case of a Spanish grant that vested right attaches on confirmation. In the case of a pre-emption, not till all the preliminary requirements of the law have been complied with, including payment of the price fixed by law; and in the case of a New Madrid location when the survey has been returned to the recorder of land titles.

But conveyances of the inchoate title in the land existing previous to the establishment of the right to demand a patent have been invariably recognized by the Government, and *bona fide* alienees have in all cases held the legal title when issued under the doctrine of relation.

IV.

All the cases, without exception, referred to by the plaintiffs in error touching the law of New Madrid locations involve controversies between individuals claiming different titles from the United States. Each claiming under a separate and independent grant, it became necessary for the courts to fix some period of time when the locator of a New Madrid certificate became vested with such a right in the land selected as to prevent the United States from conveying it to a third person.

To secure a patent in the case of a New Madrid location, the first necessary step was to apply to the recorder of land

titles and make proof of loss of specific land by earthquakes in New Madrid county. The second was the issue of a certificate by the recorder entitling the holder to locate other lands. The third was the application by the holder to the surveyor general of the district to locate the certificate, and specifying particularly the lands on which he desired to place his certificate. The fourth step was for the deputy surveyor to go upon the land and make actual survey and plat thereof.

All these were steps no less essential to the acquisition of title than the filing of a copy of this plat in the recorder's office.

Surely as between the locator and the alienees of his inchoate right made by deed after filing his certificate and designating the land selected by him, if the location be followed to a patent, the alienees have the better right. This Court, in the cases referred to, have said only that until the recorder by accepting and filing the survey has said that no private claims conflicted with the location, the claimant had no such right as to prevent the Government conveying the land to others.

Authorities on the first point.

a. In Romie *v.* Casanova, 1 Otto, 379 (error to supreme court of California), both parties claimed title from the city of San José. This Court said:

"The title of the city was not drawn in question. It is said that depended on the treaty of Guadaloupe Hidalgo and the several acts of Congress to ascertain and settle private land claims in California, but this does not appear in the record. Even if it did, the case would not be different, for both parties admit the title of the city, and their litigation extends only to the determination of the rights which they have severally acquired under it."

In McStea *v.* Friedman, 2 Otto, 723, it is said:

"No Federal question was involved in the decision of the supreme court (of California). The city's title was not drawn in question. The real controversy was as to the transfer of that title to the plaintiffs in error, and this did not depend upon the 'constitution or any treaty or statute of or commission held or authority exercised under the United States.'"

Citing—

4 Saw., 180.

3 Wood, 61.

"The Government has no interest in contests between persons claiming *ex post facto* the grant, nor is it charged to decide between such claimants."

Castro *v.* Hendricks, 23 How., 438 (16 : 576).

In a Mexican claim when the Government no longer claims the land in question to be public land the right of the United States to contest the case ceases, and this Court will not entertain jurisdiction to determine to which of two private claimants it may belong.

U. S. *v.* Morillo, 1 Wall., 706 (17 : 626).

This Court has uniformly held that the 34th section of the judiciary act is not confined in its scope to the statutory enactments of the States, but applies to the rulings of the State courts in all matters touching title to realty.

Jackson *v.* Chew, 12 Wheat., 153.

Henderson *v.* Griffin, 5 Peters, 151.

Green *v.* Neal, 6 Peters, 291.

United States *v.* Wauson, 1 Gallison, 5.

"This Court adopts the State decisions, because they settle the law applicable to the case, and the reasons assigned for this course apply as well to the rules of construction growing out of the common law as the statute law of the State, when applied to the title of lands."

Jackson *v.* Chew, 12 Wheaton, 153.

The Supreme Court of the United States, in Ross *v.* Barland, 1 Peters, 664, says: "Where by the established practice of courts in particular States the courts in actions of ejectment look beyond the grant and examine the progressive stages of the title from the incipient state to its consummation, such a practice will form the law of cases decided under the same in these States."

In Harpending *v.* Dutch Church, 16 Peters, 455, the Supreme Court of the United States said: "*We are bound to conform to the decisions of the State courts of New York in the construction of their acts of limitation.*"

The U. S. circuit court of Virginia decided a question affecting realty, and after appeal to the Supreme Court of the U. S. the Virginia court of appeals decided a similar question differently. The Supreme Court reversed the lower court and held that "if the highest judicial tribunals of a State adopt new views as to the proper construction of such a statute and reverse its former decisions, the court will follow the latest settled adjudications."

U. S. *v.* Morrison, 4 Peters, 124.

In the case of Green *v.* Neal's Lessee this Court held as follows: "The decision of this question by the highest judicial tribunal of a State should be considered as final by this Court; not because the State tribunal in such a case has any power to bind this Court, but because, in the language of the Court in the case of Shelby *v.* Grey, 11 Wheat., 361, 'a fixed and received construction by a State in its own courts makes a part of the statute law.'"

The Court in this case further says: "The exposition forms a part of the local law and is binding on all the people of the State and its inferior judicial tribunals. It is emphatically the law of the State which the Federal court, whilst sitting within the State, and this Court, where a case is brought before them, are called to enforce." * * *

In Bodley *v.* Taylor, 5 Cranch, 221, the Supreme Court

permitted an equitable defense against a legal title in order to conform its decisions to those of the supreme court of Kentucky.

In the case of Taylor *v.* Brown, 5 Cranch, 255, the Court says: "In questions respecting title to real estate especially, the same rule ought certainly to prevail in both courts."

In the case of Polk's Lessee *v.* Wendall, 9 Cranch, 87, the Court says: "In cases depending on the statutes of a State, and more especially in those respecting titles to land, this Court adopts the construction of a State where that construction is settled and can be ascertained."

In the case of Thatcher *v.* Powell, 6 Wheat., 119 (an action of ejectment), the Supreme Court holds that "in construing the acts of the legislature of a State, the decisions of State tribunals have always governed this Court."

In the case of Ellmendorf *v.* Taylor, 10 Wheat., 152, opinion by Chief Justice Marshall, it is said: This Court, "in cases depending on the laws of a particular State, will, in general, adopt the construction which the courts of the State have given to those laws." "This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government."

In the case of Jackson *v.* Chew, 12 Wheaton, 153, it is held "that this Court adopts the local law of real property as ascertained by the decisions of the State courts, whether their decisions are grounded on the construction of the statutes of the State or form a part of the unwritten law of the State, which has become a fixed rule of property." Hence, in the case of Green *v.* Neal's Lessee, the Court appropriately said: "The rights of parties are determined under those laws, and it would be a strange perversion of principle if the judicial exposition of these laws by the State tribunals should be disregarded. These expositions constitute the law and fix the

rule of property. Rights are acquired under this rule, and it regulates all the transactions which come with its scope."

In the case of Leffingwell *v.* Warren, 2 Black, 599, the Supreme Court of the United States said:

"The construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text."

Citing—

Shelby *v.* Guy, 11 Wheat., 351.
McClurey *v.* Silliman, 3 Pet., 270.
Greene *v.* Neal's Lessee, 6 Pet., 291.
Ross *v.* Duval, 13 Pet., 45.
Massengall *v.* Donns, 1 How., 767.
Nesmith *v.* Sheldon, 1 How., 812.
Van Renssler *v.* Kearney, 11 How., 297.
Webster *v.* Cooper, 14 How., 504.

It is admitted that an equitable interest in real estate could be sold under execution under the laws of Missouri at the time of the levy, sale, and deed made by Sheriff Walker to Relfe and Chew in 1823. (1 Ter. L., p. 120, sec. 45.)

In Landes *v.* Perkins (12 Mo., 259) the supreme court of Missouri said:

"It is a matter of history, of which this court will take judicial notice, that at the time of the cession of Louisiana to the United States, in that portion of the territory of which this State is composed, nineteen-twentieths of the titles to lands were like that involved in this case prior to its confirmation. There were very few complete grants. * * * There being so few complete titles, the legislature, in subjecting lands and tenements generally to execution, must have contemplated a seizure and sale of those incomplete titles which existed under the Spanish government. At the date of the act above referred to (Oct. 4, 1804, by the territorial legislature subjecting lands to sale) no titles had been

confirmed by the United States. An instance is not recollected in which a question has been made as to the liability of such titles as Clamorgan's under the Spanish government to sale under execution. It is believed that such titles have been made the subject of judicial sales without question ever since the change of government."

In the same case the following language is used:

"Under the execution law of Missouri it was in the power of the defendants to elect on what property an execution should be levied, whether on real or personal." (Digest, 1825.)

And further:

"When Congress enacted that the death of a patentee, at the date of the patent, should not avoid the grant, but that it should inure to the benefit of the heirs or assignees of the patentee, it clearly expressed its sense of this question."

In every act of Congress from that of 1805 down to the present time the rights of assignees of inchoate grants have been respected.

The fourth section of the act of 1805, requiring the filing of notices of claims before the register of the land office, enabled the assignee to make the claim in his own name and required him to file with the original grant and order of survey all deeds, conveyances, and other written evidence under which he claimed.

Strother *v.* Lucas, 6 and 12 Peters.

In Papin *v.* Massey, 27 Mo., 445, it is said:

"The equitable title to land in the claimant is just as efficient as a complete legal title to obtain a confirmation, and inures equally to the claimant whether his claim be an equitable or legal one."

Afterwards, upon the location of New Madrid certificates, the same principles were applied, and it was held that the

equitable owner of the New Madrid land, at the issuing of the New Madrid certificate, is the person to whom it belongs. * * * The title to the newly located land belongs only to the person owning the land in lieu of which the newly located land was located.

Wear *v.* Bryant, 5 Mo., 147.
Kirk *v.* Green, 10 Mo., 252.
Page *v.* Hill, 11 Mo., 149.

In Hogan *v.* Page, 2 Wall., 605, this court held that—

"A confirmation to the original grantee or his legal representatives embraced representatives of such grantee by contract as well as by operation of law, leaving the question open in a court of justice as to the party to whom the confirmation should inure."

In Boone *v.* Moore, 14 Mo., 420, the claim was filed before the recorder of land titles in 1808 by Richardson, assignee of Mackey, who was assignee of Cole, the original grantee. The transfers from Cole to Mackey and from Mackey to Richardson were filed before the Commissioner. The confirmation was to "David Cole or his legal representatives." On the trial of the case in court copies of these transfers were offered and excluded. The supreme court of Missouri, per Napton, justice, says:

"If the confirmation by the act of Congress of July 4, 1836, was to Richardson and not to the legal representatives of Cole, the admissibility of these copies is an immaterial question. We understand the Supreme Court of the United States to have distinctly decided this question in the case of Bissell *v.* Penrose."

Carpenter *v.* Runnells, 45 Mo., 591 (1870).

In McCamant *v.* Patterson, 39 Mo., 100, it is said:

"The benefit of the act (New Madrid act, Feb'y 17, 1815), whether it be called a donation or a proffered offer of barter and exchange, was conferred directly on the owners at that

date or on those holding under them as their legal representatives after that date;" or, as said in the same case, "upon those only who were the owners of the injured lands at the date of the act, or were *their legal representatives afterwards by descent, by purchase, or by operation of law.*"

In Wear *v.* Bryant, 5 Mo., 147, it is said:

"The recorder of land titles adopted a form of certificate of location in the name of the original patentee or confirmee or 'his legal representatives' for the purpose of leaving it open to be ascertained judicially who was the person entitled to the benefit of the act as such owner; that this designation merely ascertained the line of representation in which that person was to be sought; that the question 'Who is the owner of the injured land?' must necessarily be determined by local laws—that is to say, the laws and jurisprudence then in force in this region of country," &c.

On the 20th May, 1836, Congress passed an act providing "that in all cases where patents for public lands have been or may hereafter be issued, in pursuance of any law of the United States, to a person who had died or who shall hereafter die before the date of such patent, the title to the land designated therein shall enure to and become vested in the heirs, devisees, or *assignees of such deceased patentee as if the patent had issued to the deceased person during life.*"

The formula "or his legal representatives" embraces representatives of the original grantee in the land, such as assignees or grantees, and leaves the question open to inquiry in a court as to the party to whom the patent should enure.

Hogan *v.* Page, 2 Wall., 605 (17: 854).

Carpenter *v.* Rannells, 19 Wall., 138 (22: 77).

A Spanish claim to land, if confirmed by the commissioners, has the effect of a confirmation to the legal representatives of the person to whom the original concession was made, where the commissioners passed upon nothing but the merits of the original concession.

Connoyer *v.* Schaeffer, 22 Wall., 254 (22: 827).

Under the act of 1836 a patent issued upon a Spanish claim which had been confirmed to the claimant or his legal representatives vested the legal title in him, and enured by way of estoppel to his grantee and those who claimed by deed under him.

Stoddard *v.* Chambers, 2 How., 284 (11 : 269).
Landes *v.* Brant, 10 How., 348 (13 : 449).
Easton *v.* Salisbury, 21 How., 426 (16 : 181).

"A tract of land subject to entry when purchased and paid for ceased to be the property of the United States or subject to its disposal. The legal title is then held by the United States for the benefit of the purchaser, and on proper application the Government is bound to issue its patent to the purchaser."

Cornelius *v.* Kessell, 128 U. S., 456 (32 : 482).

The subsequent grant of lands in a Spanish claim to the heirs of the claimant who had executed a mortgage thereon by act of Congress of 1836 carried the equities of the mortgagee with the legal title, of which he took the benefit.

Massey *v.* Papin, 24 How., 362 (16 : 734).

The case of Burk *v.* Marshall, 6 How., 285, was a sale of a possessory right to two lots in the town of Dubuque. This Court said:

"At the time of this transaction the United States had not yet offered the land on which the town of Dubuque was situated for sale; but, notwithstanding the occupants of lots were mere tenants at sufferance only, they proceeded to make valuable improvements under the expectation of the grant of the right of pre-emption from the Government, or, at least, that they could complete their title by purchase from it when the lots should be offered for sale. These possessions and improvements were treated as valid and subsisting titles by the settlers, and were the subjects of contract and sale by conveyances in the form usual for passing a title in fee."

The Court then proceeded to decide that in such case, if the vendor received the title from the Government, that title enured to the vendee; and it further held that, as the vendee had bought the title at the public sale of lots, he became a trustee for the original vendor.

Contracts in regard to possessory interests in public lands in Oregon made by occupants before the donation act of 1850 were not invalidated by that act, which prohibited sales for the future.

Lamb *v.* Davenport, 18 Wall., 307 (21:759).
Stark *v.* Starr, 94 U. S., 477 (24:276).

"The purchaser by such a contract acquired an equitable right to the land, which would be enforced when the legal title was obtained."
(*Idem.*)

It is a well-established principle of law that where a vendor undertakes to convey land in which he has no vested interest or only an equitable title the contract will be enforced in equity as an executory agreement to convey where the intention of the parties is apparent and the consideration sufficient; and this is especially true where the equitable interest assigned is derived from the same source as the subsequently acquired legal title or where such equitable interest is the basis or foundation on which is obtained the subsequently acquired legal title.

Duchess of Kingston's case, 2 Smith, L. Cas., 623, and authorities therein cited.
Jackson *v.* Waldron, 13 Wend., 178.
Breckenridge *v.* Churchill, JJ. Mar., 13 —.

In Missouri it has been always held that where a deed purports on its face to convey a fee-simple title to lands, and the grantor has at the time neither a legal nor equitable

estate therein, a subsequently acquired legal title will pass by operation of the conveyance.

13 Mo., 365.
17 Mo., 13.
18 Mo., 486.
See Territorial Laws in appendix to this brief.

"The rule has always been that covenants for title worked an estoppel; but this rule has been carried farther, and it is now established that where the grantor sets forth on the face of his conveyance, by averment or recital, that he is seized of a particular estate in the premises, and which estate the deed purports to convey, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was seized and possessed at the time he made the conveyance. The estoppel works upon the estate and binds an after-acquired title as between parties and privies."

French *v.* Spencer, 21 How., 228.

Easton, being the owner of the New Madrid land, made his bond to convey 240 acres of it to Hammond on September 3, 1818. On September 29, 1823, Easton, for a valuable consideration and "pursuant to the conditions" of his bond to that effect, conveyed the land in fee to Hammond. This same land, by metes and bounds, was sold by the sheriff on October 8, 1823, and the title under the sheriff's deed is now held by defendants in error.

In the case of Lamb *v.* Davenport, already cited, it is held that contracts made by actual settlers on the public lands concerning their possessory rights are valid as between the parties to the contract, though there be at the time no act of Congress by which the title may be acquired and though the Government is under no obligation to either of the parties in regard to the title, unless they are forbidden by some positive law.

In that case it was distinctly held by this Court as follows:

"The right of the United States to dispose of her own property is undisputed, and to make rules by which the lands of the Government may be sold or given away is acknowledged; but subject to these well-known principles parties in possession of the soil might make valid contracts even concerning the title predicated upon the hypothesis that they might thereafter lawfully acquire the title except in cases where Congress had imposed restrictions on such contracts."

Citing—

Sparrow *v.* Strong, 3 Wall., 97.
Myers *v.* Croft, 13 Wall., 291.
Thredgill *v.* Pintard, 12 How., 24.

In the case of Landes *v.* Brant, 10 How., 348, it appeared that one Dodier was the grantee of a Spanish concession which, previous to confirmation, he conveyed to Clamorgan in 1807. In 1808 Sarpy recovered a judgment against Clamorgan in the district court of St. Louis, on which an execution was issued, and Clamorgan's interest was sold by the sheriff and purchased by McNair. After these proceedings the board of commissioners confirmed this claim, in 1811, and a patent was issued thereon in 1845 to Clamorgan or his legal representatives.

The chief question before this Court was whether the sheriff's sale and deed conveying the equitable interest constituted the purchaser a legal representative of Clamorgan. On that question this Court said: "'But there is another consideration equally conclusive in favor of the sheriff's deed in the present instance.' Clamorgan died in 1814, and by his will devised his lands to his illegitimate children, under whom the plaintiff Landes claims title. In 1845 a patent issued purporting to convey to Clamorgan, in fee simple, the land in dispute. According to common law the patent was void for want of a grantee; and to supply this defect Congress had passed a general law (May 20, 1836) declaring as follows (here citing the statute of 1836 in regard to patents). Of course the assignee, by *bona fide* conveyance, would come in before a volunteer, such as an heir or devisee. Here the

assignee of the devisee is suing the alienee of the devisor. The patent issued in 1845 is the ultimate and conclusive evidence of title in this instance, as the board of commissioners had no power to grant and communicate the fee held by the United States. Their decision was final to this extent—the officers of the Government were bound to award the patent to Clamorgan without any further action on the part of Congress. But this adjudication does not stand on the footing of cases where the commissioners were ordered to report and Congress reserved the power to confirm the report, and thus to grant the fee by act of Congress. In such cases this Court has held that Congress had granted the fee, and that no patent was required as a further assurance of title. To what description of assignee, then, did the title enure according to the act of 1836? Necessarily to one claiming not the legal but the equitable title existing when the patent issued, and in him the legal title is vested by the patent. The same rule was applied in the case of Stoddard *v.* Chambers, 2 How., 316.

"In 1800 a concession was made to Mordecai Bell; in 1804 Bell conveyed to James Mackay, and in 1815 Mackay conveyed to Amos Stoddard, whose heirs were the plaintiffs.

"The claim was filed with the board in 1808, and in 1836 it was confirmed to Mordecai Bell 'or his legal representatives.'

"This Court held, on the foregoing state of facts, that 'when under the act of 1836 the report of the commissioners was confirmed to Bell and his legal representatives the legal title vested in him and enured by way of an estoppel to his grantee and those who claimed by deed under him.' There was no covenant for title in either the assignment from Bell to Mackay or from Mackay to Stoddard, each being quit-claim assignments.

"So again in the case of Bissell *v.* Penrose, 8 How., 317, the same principle was maintained. In August, 1800, Tillier filed his claim with the board and asked a confirmation for 800 arpents, and it continued before the different boards, sitting at St. Louis, until 1836, when it was confirmed by Congress.

"In 1818 Tillier assigned his claim to Penrose, and in 1820 Penrose assigned his claim acquired from Tillier to Mary B. and Anna Penrose, who were the plaintiffs in the ejectment suit, and who recovered the land under their deed of 1820.

"In *every* case where this Court has been called on to investigate titles where conveyances of lands had been made during the time that a claim was pending before a board of commissioners, and where the claim was ultimately confirmed in the name of the original claimant, the intermediate assignments have been upheld against the confirmee and his heirs or devisees in the same manner as if he had been vested with the legal title at the date of the conveyance. We are, therefore, of the opinion that the sheriff's deed made to McNair in 1808 must be supported on this ground also."

The holder of a register's certificate of the purchase of a lot in the town of Dubuque lawfully acquired and issued by the register under the two acts of July 2, 1836, and March 3, 1837, has such an equitable estate in the lot before the issuing of the patent as will subject the lot to sale under execution under the statutes of Iowa.

Levi *v.* Thompson, 4 How., 17.

The brief of the attorney in that case is as follows:

"The legislature of the Territory of Iowa could confer no authority on, the sheriff to sell the property in question because the title was yet in the United States and had not passed to Levi and Thompson at the time of the sheriff's sale."

And to sustain the contention he cited Bagnell *v.* Broderick, 13 Peters, 436, and Wilcox *v.* Jackson, 13 Peters, 498 *et seq.*

This Court said:

"This right to the fee and a patent in this case gave to Levi and Thompson that equitable right to the land under the certificate of the receiver of the land office which the law of Iowa has made subject to execution for the satisfaction of judgments."

Again:

"The fee continues in the United States until the issue of

the patent, but the right to the fee was in the purchasers, and they were entitled to a patent for the land unless there was some legal objection by the United States against issuing it, of which this Court is not advised."

Authorities on the second and third points.

The objections here presented are the same relied on in the case of Landes *v.* Brant, in 10 How. It was urged that Clamorgan's interest was not even an equity; that a conveyance of the land to any other person by the Government up to the time when the commissioners recommended its confirmation, in 1811, would have passed the title, and Clamorgan would have been remediless. This was undoubtedly true. It has been held by all the courts that these concessions were mere inchoate titles, and that the claimant had no legal or equitable right, *as against the Government or its alienees*, until after confirmation and actual survey of the lands by Federal officers.

The court, referring to the sheriff's deed in this case, said:

"The proceeding was not void, but passed to the purchaser at execution sale all the title that would have passed from Clamorgan had he made a quitclaim deed to McNair, the purchaser. * * * That such was the force and effect of a regular sheriff's deed under the local laws of the then Missouri Territory is not open to question, nor is it controverted; and the only remaining consideration in this branch of the case is whether the sheriff's deed can be set up as a defense at law, notwithstanding the confirmation and patent, both of which are of subsequent date to the sheriff's sale and deed."

The court thereupon proceeded to declare the conveyance by the sheriff to be a valid title, in the following language:

"The confirmation of 1811 and the patent of 1845 must be taken to relate to the first act—that of filing the claim in 1805. On this assumption intermediate conveyances made by the confirmee or by the sheriff on his behalf, of a date

after the first substantial act, are covered by the legal title, and passed that title to the alienee, and on this ground the deed made by the sheriff to McNair is valid."

The court, in the same opinion, approves the language of Cruise's Digest, vol. 5, p. 510:

"There is no rule better founded in law, reason, and convenience than this: that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act and operate from the substantial part by relation."

This Court, in the Hot Springs cases, distinctly laid down seven primary steps in the case of a New Madrid title, beginning with the application to the recorder for the New Madrid certificate and ending with the filing of the survey with the recorder, all of which steps are necessary to procure the patent; and in this case they declare that the patent when issued relates back to the first or original act which was necessary to obtain it. Their language is as follows:

"Where there are divers acts concurrent to make a conveyance, estate, or other thing, the original act shall be preferred, and to this the other acts shall have relation."

It cannot be denied that the survey of the New Madrid location returned by Brown on June 23, 1819, was a ceremony absolutely necessary to secure the title in this case. This survey was a necessary step for segregating the land from the public domain. It was then conveyed by Easton and occupied and cultivated by his alienees. The metes and bounds of the survey were well known and the Government adopted this same survey in the issue of its patent in 1859. If, then, this was a necessary part of the proceedings, in order to obtain the Government patent, the title necessarily goes back by relation to this incipient step.

The same doctrine is announced by the Supreme Court

of the United States, through Chief Justice Marshall, in Taylor *v.* Brown, 5 Cranch, 553, to wit:

"The principle on which relief is granted is that the patent, which is a consummation of title, does in equity relate back to the inception of title, and therefore, in a court of equity, the person who has first appropriated the land in contest has the best title, unless his equity is impaired by the circumstances of the case."

In Stark *v.* Starrs, 6 Wallace, 418, the court says:

"When, in fact, the patent was issued it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants."

In Shepley *v.* Cowan, 91 U. S., 337, the court says:

"The party who takes the initiatory steps in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act and cuts off all intervening claimants."

This latter case is absolutely conclusive of the case now at bar. It fully explains the language of the Hot Springs cases, which were decided at the same term of court and reported in the next volume of reports. The court refers to the cases of Frisbie *v.* Whitney, 9 Wall., and the Yosemite Valley cases, 15 *id.*, 77, and says that an inchoate right obtained by settlement or otherwise is not such a vested interest as to deprive Congress of the power to dispose of the property; that Congress could at any time reserve such lands from sale for arsenals, fortifications, or other public uses, and that a settlement on public land, accompanied even by improvement, "did not confer upon the settler any right in the land *as against the United States* or impair in any respect the power of Congress to dispose of the land *in any way it might deem proper*."

The court is particular to use the words "as against the

United States" and to italicize them in its opinion. In a subsequent part of the opinion the court says:

"But whilst, according to those decisions, no vested right as *against the United States* is acquired until *all* the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land when the United States have determined to sell or donate the property. In all such cases the first in time in the *commencement* of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

The court continues:

"When these prerequisites (steps necessary to obtain title) were complied with the settler for the first time acquired a *vested interest in the premises*, of which he could not be subsequently deprived. He was then entitled to a certificate of entry from the local land officers and ultimately to a patent from the United States. Until such payments and entry the acts of Congress gave to the settler only the privilege of pre-emption in case the lands were offered in the usual manner—that is, the privilege to purchase them in that event in preference to others."

The question in this case (Shepley *v.* Cowan) was whether Chartrand's title related back to his original settlement on the land, so as to antedate the inception of the title of the State.

The court expressly says that this mere right of preference, as against third persons, did not rise to the dignity of an equity; "that Congress might have then withdrawn the land from settlement or pre-emption and granted it directly to the State of Missouri or reserved it from sale for public purposes, and no vested right in Chartrand or his heirs, as against the United States, would have been invaded by its action; but, having allowed by its subsisting legislation the acquisition of a right of preference as against others to the

earliest settler or his heirs, the way was free to the prosecution of the claim of the heirs."

Hence it is that the court holds that when the title finally emanated from the Government it related back, as against third persons, not to the time of payment of the purchase-money and entry with the local land officers, but to the period of earliest settlement—a period when Chartrand was even denied the right to enter and had no title, legal or equitable, *as against the Government.*

The court makes the bare settlement the initiatory step, and then says:

"The party who takes this step, *if followed up to a patent,* is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act and cuts off all intervening claimants."

If the patent of 1859 enured to Easton, as Hunot's legal representative, when issued it related back to the first necessary step taken by Easton in the acquisition of the title. The Supreme Court has specifically defined those necessary steps. The first was taken August 12, 1816, in the issue of the certificate. The second was taken when Brown located the certificate on the specific land subsequently conveyed by the patent. The third was taken when, on June 23, 1819, Brown returned his survey to the surveyor general, which survey segregated the soil from the public domain. Either of these dates is sufficient to support the doctrine of relation, as repeatedly construed by the Supreme Court, and vests in these defendants all that Easton or Hammond ever held or can hold in the disputed land.

In Washburn on Real Property, vol. 3, page 308, it is said:

"There are cases where the transaction is not complete and effectual in itself to convey title to lands, but by being connected with other acts or transactions, as parts of the

one under consideration, it became effective by the relation which the law creates between them, whereby they are made to partake of the character of a single and integral act. It may be difficult to classify these cases; but a reference to a few of them will give a general idea of what is here meant. One of these would be the case of a sale of premises made by a sheriff upon execution, but no deed delivered until a subsequent period, during which the judgment debtor had died. When a deed is given it has a relation back to the sale, and is considered as then taking effect, and its validity is not affected by the intermediate death of the debtor."

Washburn, in his Treatise on Real Property, referring to the case of Landes against Brant, says:

"The title in question was an imperfect one in the original claimant under the Spanish Government, and a creditor of the one holding this title had seized his title on execution; and subsequently to this the United States confirmed the title to the original claimant. It was held that, by relation, he was the real owner when the sale was made, and, consequently, the purchaser under the sheriff's sale held the land against the devisees of the original claimant."

The only limitation placed by the courts upon the doctrine of relation is that it shall not work injustice to the rights of innocent third parties acquired between the events which it is proposed to unite by relation. It is, therefore, invariably held that a deed made in pursuance of a previous contract will, as between the parties, relate back to the date of the contract; but such relation will not be allowed to work injury to intermediate innocent purchasers or strangers who acquire an interest without notice. In other words, as between parties it is adopted for the advancement of justice, but is not permitted to work wrong to strangers.

Vancourt *v.* Moore, 26 Mo., 92.
Jackson *v.* Bard, 4 Johns, 230.
Fight *v.* Doe, 1 Blackf., 127.
Sampson *v.* Thornton, 3 Met., 275.
Wash. Real Prop., 3d vol., 308, '9.

In the case of Lessee of French and wife *v.* Spencer (21 Howard, 228) Congress had passed an act, March 5, 1816, granting bounty lands to certain volunteers. Under this act a warrant was issued to one Silas Fosgit to locate 300 acres of land. This warrant was placed in the hands of an agent, who located it in Vigo county, Indiana, on June 3, 1816. No patent was issued for the land until the 26th of October, 1816. When issued the grant was made to said Silas Fosgit. On the 28th of June, 1816, after the location and before the issue of the patent, Fosgit conveyed the land to William H. Spencer, of New York.

The Supreme Court held that this land belonged to Spencer's heirs. The following language is found in the opinion of the Court:

"Whether the patent related back in support of Spencer's deed is not a new question in this Court. It arose in the case of Landes *v.* Brant (10 How., 372), where it was held that a patent issued in 1845 to Clamorgan and his heirs, by which the heirs took the legal title, related back and enured to the protection of a title founded on a sheriff's sale of Clamorgan's equitable interest made in 1808. There, as here, the contest was between the grantee's heirs and the purchaser of the incipient title, the Court holding when the patent issued it related to the inception of the title and must be taken, as between the parties to the suit, to bear date with the commencement of the title. It is also the settled doctrine of this Court that an entry in a United States land office on which a patent issues (no matter how long after the entry is made) shall relate back to the entry and date with it (Ross *v* Barland, 1 Pet., 655). The fiction of relation is that an intermediate *bona fide* alienee of the incipient interest may claim that the patent enures to his benefit by an *ex post facto* operation and receives the same protection at law that a court of equity could afford him."

In this case the incipient interest alluded to was the location of the original warrant on the tract of land in dispute, and this location consisted only of a notice to the register of the local land office that the holder of the warrant desired

to locate it on certain lands. It is certainly clear that the Government at any moment thereafter and before the issue of the patent had a right to cancel this location, and the holder of the warrant would have had no remedy whatever against the Government. But inasmuch as the Government proceeded thereafter to issue the patent, the patent, when issued, related back so as to enure to the benefit of any one who held a deed from the original holder of the warrant.

A, holding a bounty land certificate, gave B a bond to convey to him land that might be entered thereby and a power of attorney to locate and obtain a patent. A having died, B located the land in A's name and the patent was issued to A. Under a special statute of Arkansas, in which State the lands lay, the administrator of A conveyed the land to B, in compliance with A's bond. The heirs of B sold and conveyed the lands, after patent, to third parties. In a controversy between B and the alienees of the heirs, this Court said "that the special act of Assembly authorized the administrator to make a valid deed and divest the title of the heirs was decided in this case by the supreme court of Arkansas, and which decision, on the effect of the State law, is conclusive on this Court."

Maxwell *v.* Moore, 22 How., 185.

In the case of Ross *v.* Barland, *supra* (1 Peters), the court says:

"In the action of ejectment they (the courts) look beyond the grant and examine the progressive stages of the title, *from its incipient state, whether by warrant, survey, entry, or certificate,* until its final consummation by grant, and if found regular and according to law in these progressive stages the grant is held to relate back to the inception of the right and to have dignity accordingly."

In Touchard *v.* Crow, 20 Cal., 150 (Field, chief justice), it is said:

"At the time the deed was executed the claim of Ayerman and others to the land embraced in the grant to Padilla was pending before the land commission for confirmation. The decree of confirmation affirmed the validity of that grant and of the claim of petitioners. The patent following the confirmation took effect by relation at the date of the presentation of the petition to the land commission, on February 24, 1852. As the deed of the United States, it is to be regarded, so far as all intermediate conveyances are concerned, as having been executed at that time. (Citing 13 Cal., 478; 14 *id.*, 465; 15 *id.*, 361; 17 *id.*, 250; 18 *id.*, 570.) The deed to Stevens must therefore be held to have passed the interest acquired by the patent."

In State *v.* Barrett, 15 Cal., 361 (Field, chief justice), it is said:

"The patent is the last act of a series of proceedings taken for the recognition and confirmation of the patentee's right to the land it embraces, the first of which is the petition to the board of land commissioners. With reference to such proceedings, the patent takes effect by relation at the date of the first act; and so we have held in repeated instances. As the deed of the United States, it is to be regarded as if it had been executed at that time. * * * "In the case at bar all the conveyances under which the plaintiff claims were executed previous to the issuance of the patent. They passed, therefore, only the right of the grantors under the grant. But the patent in recognizing the validity of the grant necessarily establishes the validity of all properly executed intermediate transfers of the grantee's interest."

The above doctrine has always been held by the supreme court of Missouri in similar cases.

Alexander *v.* Merry, 9 Mo., 510.
Page *v.* Hill, 11 Mo., 149.
Crowley *v.* Affalter, 49 Mo., 263.
Porter *v.* Mariner, 50 Mo., 364.
Papin *v.* Massey, 27 Mo., 445.
St. Louis *v.* Taney, 21 Mo., 243.
McCabe *v.* Worthington, 16 Mo., 514.

In Papin *v.* Massey, that court, speaking of the patent to Mackey or his legal representatives, says:

"It enured, then, to his legal representatives. These representatives may be his heirs or assigns. If he had conveyed the claim it would enure to his assignee. If there had been no conveyance the title would have passed to his heirs."

In Porter *v.* Mariner the Missouri court said:

"A sheriff's deed relates back to the sale as to the defendant in the execution and his privies and as to strangers purchasing with notice, and vests the title in the execution purchaser from that time."

In Callahan *v.* Davis, 90 Mo., 78, it is said: "It will be seen that Thompson conveyed the land to Turpin by a quitclaim deed after he had entered it and before he received the patent; and the contention is that this deed did not convey the after-acquired title, so that Turpin only got an equity, and that the plaintiff cannot maintain this suit at law on that title. Thompson, by his certificate of entry, got an imperfect title, one upon which, by the laws of this State, he could have maintained an action of ejectment for the land against any person not having a better title (R. S., 1855, § 2, p. 690). The patent when issued made that imperfect title a perfect legal one. The entry and the patent were all several acts necessary to make a complete title, and are to have relation back to the act which created the equitable title;" citing—

Landes *v.* Brant, 10 How. (U. S.), 372.
Tonchard *v.* Crow, 20 Cal., 150–'60.
Crowley *v.* Wallace, 12 Mo., 143.
Landes *v.* Perkins, 12 Mo., 239 (same title as in Landes *v.* Brant).
Stark *v.* Bassett, 15 Cal., 361.
Porter *v.* Mariner, 50 Mo., 364.
Gibson *v.* Chouteau, 39 Mo., 538.

Fenn *v.* Holme, 21 How. (U. S.), 481.
Leach *v.* Koenig, 55 Mo., 451.
3 Washburn R E., 276.
Winn *v.* Cole, Walker's Miss., 119.
Gibson *v.* Chouteau, 13 Wall., 98.
Ford *v.* French, 72 Mo., 250.

The case of Massey *v.* Papin, 24 Howard, 362, is as follows:

In 1806 one James Mackey presented his Spanish claim before the board of commissioners, and in 1809 the board rejected the claim. In 1814 Mackey gave a bond in the nature of a mortgage to a part of the land to Delassus. Papin became the assignee of the mortgage and foreclosed and purchased, taking his title by sheriff's deed. The plaintiffs were Mackey's heirs. The defendant was Papin. Congress confirmed the claim, by the act of 1836, to James Mackey or his legal representatives, and on these facts this Court said:

"An imperfect Spanish title, claimed by virtue of a concession, was by the laws of Missouri subject to sale and assignment, and, of course, subject to be mortgaged for a debt. The heirs of Mackey took the lands by descent, with the incumbrance attached, and held them in like manner that their ancestor held. The grant of the lands to the heirs by the act of 1836 carried the equities of the mortgagee, with the legal title, of which he took the benefit—a consequence contemplated by the mortgage itself; and if the assignment had been in its form a legal conveyance of the lands, the grantee would have taken a legal title; and to this effect are the cases of Bissel *v.* Penrose, 8 How., 317, and Landes *v.* Brant, 10 How., 348.

"Intermediate conveyances made by one who has taken incipient steps to procure title will be covered by the legal title when obtained, and will pass such title to the alienees against the grantee and his heirs and against his assigns with notice; and this doctrine equally applies, whether such

intermediate conveyances are made by act of the grantee himself or by the sheriff under execution."

Stoddard *v.* Chambers; 3 How., 316.
Bissell *v.* Penrose, 8 How., 317.
Taylor *v.* Brown, 5 Cr., 553.
Stark *v.* Starrs, 6 Wall., 418.
Shepley *v.* Cowan, 91 U. S., 337.

To the same effect see this case (Hammond *v.* Johnston), 93 Mo., 198.

"Where there are divers acts concurrent to make a conveyance, estate, or other thing the original act shall be preferred, and to this the other acts shall have relation."

Citing—

Viner's Abridgment Title Relation, p. 290.
Jackson *v.* McMichael, 3 Cowan, 75.
Crowley *v.* Wallace, 12 Mo., 145.

In Chouteau *v.* U. S., 9 Peters, 147, it is held that—

"Orders of survey made by the lieutenant governor of Upper Louisiana are the foundation of title and are capable of being perfected into complete titles; *that they are property capable of being alienated, and as such to be held as sacred and inviolable as other property.*"

The location of a warrant or order of survey or an entry with the register and receiver is an *actual* location, an incipient and necessary step in the acquisition of title. It becomes a *perfected* location when returned to and approved by the Commissioner of the General Land Office. It becomes a completed title only on the issue of the patent. An alienee of the locator, at any moment after the first act, takes the title under the patent.

It is persistently urged by the counsel for plaintiffs that because a sheriff's deed is a quitclaim of an existing title the subsequent issue of a patent for the same land will

not enure to the purchaser at the sheriff's sale. On some principle not familiar to me, and unknown, I apprehend, to the law, he insists that the legal title is an after-acquired or different title from that involved in the equities previously existing in the same transaction and upon which the legal title emanated. This identical argument was pressed upon the Supreme Court of the United States in Landes *v.* Brant, 10 How., 374. In that case the alienee of the equitable title claimed under a sheriff's deed, precisely as we do in this case. Counsel for Landes in that case insisted that as the conveyances in the preceding case of Stoddard *v.* Chambers were voluntary deeds, *inter partes*, a distinction should be drawn between it and the case at bar. The point was thoroughly examined by that Court and answered in the following language:

"There was no covenant for title in either the assignment from Bell to Mackey or in that from Mackey to Stoddard, each being quitclaim assignments."

The Court thereupon applied the doctrine of relation under the sheriff's deed and held that the patent issued in 1845 related back to the time of filing the claim, in 1805, before the commissioners; and, said the court, "on this assumption intermediate conveyances made by the confirmee or by the sheriff on his behalf, of a date after the first substantial act, are covered by the legal title and passed that title to the alienee."

Where a grantor expressly limits his conveyance to an existing right or interest in land it is unjust that a different and subsequently acquired title should pass. But in this case the title conveyed by the patent is the same title and the same land sold by the sheriff. There is no new or different title acquired. As this Court held in Van Rensselaer *v.* Kearney, 11 How., 294:

"A deed of this character (the first named) purports to

convey and is understood to convey nothing more than the interest or estate of which the grantor is seized or possessed at the time and does not operate to bind an interest *not then in existence.* The bargain between the parties proceeds upon this view, and the consideration is regulated in conformity with it."

But the Court proceeds:

"If the deed bears on its face evidence that the grantors intended to convey and the grantee expected to become invested with an estate of a particular description or quality, or that the bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title in the technical sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted, at least so far as to estop them from ever afterwards denying that he was seized of the particular estate at the time of the conveyance."

Counsel totally failed to explain to the court how the legal title of survey No. 2500 ever became vested in Samuel Hammond without resort to the doctrine of relation. The confirmation of the land lying in New Madrid county was made by act of Congress April 29, 1816. That confirmation was not to Easton, but to Joseph Hunot. It was in lieu of a Spanish grant, given and confirmed to Hunot, that the Government consented to give and did give the land described in survey 2500, known as the New Madrid location. In order to support the proceeding leading up to the patent of 1859 it was necessary to show that those claiming under said patent owned certain lands which were injured by earthquakes in New Madrid county. It devolved upon the plaintiffs to show this fact. How do they show it? They first read a concession under the Spanish government to Joseph Hunot. They then read an application of Joseph Hunot, made January 31, 1811, to the board of commissioners to confirm this concession. They next read the re-

port of Recorder Bates, dated November 1, 1815, recommending this claim for confirmation to Joseph Hunot and not to Rufus Easton. They next read the act of confirmation, dated April 29, 1816, *made to Joseph Hunot and not to Rufus Easton.* They next read Recorder Bates' certificate, issued August 12, 1816, to Joseph Hunot or his legal representatives, reciting that the certificate was given in lieu of the lands injured by earthquakes in New Madrid county. They next presented the application made by Brown for Rufus Easton, June 16, 1818, to the surveyor general to locate the said certificate for the lands in dispute. They next present the survey returned by the deputy surveyor June 23, 1819, to the surveyor general's office, said survey being numbered 2500. They next show that this survey was returned to the recorder of land titles on January 8, 1833. It is then shown that on these proceedings a patent was issued by the Government on August 30, 1859, to Joseph Hunot or his legal representatives.

From this statement of the proceedings leading up to the patent it would appear that Joseph Hunot is the owner of the legal title of said survey. It is insisted, however, that the patent enures to the benefit of him who owned the injured land. But for the Spanish concession in New Madrid county there could have been no New Madrid location. Easton owned the New Madrid land when the exchange occurred, and is therefore owner of the located land. It will be observed that all these proceedings are dependent on each other, and they are all necessary to complete the title.

The court will observe that the two conveyances by the Government, the original concession and the New Madrid location, refer to Joseph Hunot as the original owner. If, therefore, the legal title, vested in Hunot by the patent of 1859, is made to enure to the benefit of Easton it must be effected by the doctrine of relation. In other words, the title conveyed by the patent to Hunot must relate back to 1810 in order to vest the legal title of the located land in

Rufus Easton. Counsel has therefore adopted in this case a species of relation that is accommodating. When the patent was issued, in 1859, he says in one breath the title related back only to 1833; in another he says it related back to 1810, so as to reach Hunot's deed to Vandenbenden. This is a species of relation which operates only for the benefit of the plaintiffs in error and always against the defendants.

For this extraordinary construction of the doctrine of relation counsel attempts to make the Supreme Court of the United States responsible. He refers to what is denominated as the "Hot Springs" cases (2 Otto, 698) and others of a similar character. And this brings me to the—

Authorities on the fourth point.

In the Hot Springs cases nothing was decided nor intimated to sustain the position here assumed. Certain New Madrid certificates had been previously issued, and surveys thereof were made in 1820; but no returns of said surveys were made to the recorder's office. When these locations were made, in 1818, the Indian title to the land on which they were made had not been extinguished. The public surveys were not extended over the lands till 1838; nor was the sale of the lands at that time authorized by law. No New Madrid certificate could have been legally located on land the sale of which was not at the time authorized by law. Until surveyed, lands are never subject to sale or location. Before they ever came into market, to wit, April 20, 1832, Congress passed an act reserving from sale the Hot Springs and the surrounding lands to the United States. Under these circumstances the Supreme Court decided that the claimants were not entitled to the lands located under their New Madrid certificates. It is true that the court said in this case, as they have always said, that the land covered by the New Madrid locations was not segregated from the public domain and appropriated to the claimants until the

return of the survey to the recorder of land titles, so as to prevent another appropriation of the same land by Congress. In this case there never had been a legal location of the certificates, and no appropriation could result. No title had vested in the claimants, because the claims were attempted to be located on land not surveyed nor subject to sale. The land was reserved for public uses before it ever became subject to sale; and in such cases the courts have invariably held that the location is void. But it is not said in this case, nor in *any* other case decided by this tribunal, that if patents in such cases had been issued the title would not have related back to the original issue of the New Madrid certificates as the incipient step necessary to procure the legal title. Indeed, in this identical case, the Supreme Court, in enumerating the steps necessary to obtain title under a New Madrid location, recites the following:

First. Application to the recorder asking a certificate of location.

Second. Issue of certificate by the recorder showing the amount of land to which the applicant is entitled.

Third. Application to the surveyor general presenting the certificate of location and describing the lands which the party desires to appropriate.

Fourth. Survey and plat by the deputy surveyor.

Fifth. Return of the survey and plat to the recorder of land titles to be filed and recorded, with a notice designating the tract located and the name of the claimant.

Sixth. Certificate of the recorder stating the facts and that the party is entitled to a patent.

Seventh. Transmission of this certificate to the General Land Office.

Eighth. The patent.

Counsel refers also to the case of Lessieur *v.* Price (12 Howard, 59). In that case, as in the Hot Springs cases, each party claimed directly from the Government. It was a case where two titles had emanated from the Government, and the only controversy was which was the elder title. Lessieur claimed under a New Madrid location, the survey of which was returned to the recorder on February 11, 1822. The survey was not made by the deputy surveyor till August 5, 1821. Price claimed under the State of Missouri, it being a part of the land selected by the State under the act of March 6, 1820, granting four sections to that State for a capital.

On the 28th June, 1821, the State had fully completed the selection of four sections, and on that day, required by law the governor to notify the surveyor general thereof, giving a full description of the lands selected, and on the 31st of December, 1821, the legislature completed the transaction by fixing the seat of government on the lands so selected and accepting them for that purpose.

Under these circumstances this Court said: "It follows that the legal title of the State of Missouri is older than the equitable title set up under Delisle's claim."

To the same effect is the case of Rector *v.* Ashley (6 Wall., 142). Rector claimed under a New Madrid location, of which no survey whatever had been returned to the surveyor general's office and the survey of which had not reached the recorder's office until June 16, 1838. Ashley claimed under the act of Congress approved June 23, 1836, granting to the State of Arkansas five sections of land to complete its public buildings at Little Rock. That State passed an act November 4, 1836, to sell the lands thus granted in June previous,

and on June 5, 1838, Ashley obtained the title sold by the State. The controversy, therefore, is between persons claiming separate and distinct titles, each claiming directly from the United States.

The learned judge who delivered the opinion in this case reviewed the case of Bagnell *v.* Broderick, 13 Pet., 436, in which it was said:

"The United States never deemed the land appropriated until the survey was returned to the recorder of land titles, for the reason that there were many titles and claims, perfect and inchoate, emanating from the provincial governments of France and Spain and others from the United States in the land district where the New Madrid claims were subject to be located."

The court also quoted from the case of Barry *v.* Gamble, 3 How., 32, where it is said:

"Its (the survey) return by the surveyor, with a notice of location, to the office of recorder was the first *appropriation* of the land."

The court then proceeds as follows:

"We are much pressed in the present case with the argument that the title here spoken of by the court is the *legal* and not the *equitable* title, and that, inasmuch as the applicant has done all that he can do to make good his claim to the land when he has deposited with the surveyor his certificate of loss, with a description of the land desired in exchange, he has thus acquired an equitable interest in the land so described *which the United States cannot divest by giving it to another.*

"But the rights of claimant are to be measured by the act of Congress and not exclusively by what he may or may not be able to do, and if a sound construction of that act shows that he acquires no *vested interest* in the land until the officers of the Government have surveyed the land and until that survey is filed in the office of the recorder and approved by him, then, as claimant's rights are created by that statute, they must be governed by its provisions, whether they be hard or lenient. It seems to us clear from the foregoing

cases that the court intended to decide that until this was done the claimant acquired no *vested right* to the land; no title, legal or equitable.

"It is evident that in the case of Lessieur *v.* Price the court is not speaking of the legal title. The statute of 1815 required a patent to be issued on the return of the survey to the recorder's office. The *strict legal title* remained in the United States until the patent issued, and the court could not have referred to that. On the contrary, it is obvious that the court was endeavoring to fix the point in the proceedings when the right of the claimant became *vested, when his equity became a fixed fact,* when the land he sought was *appropriated* to him, and when his injured land became the property of the United States, and by each of the three decisions we have cited this is held to be when the survey is returned to the office of the recorder of land titles. The *legal* title conveyed by the patent may not issue for years afterwards, but by the act of the legislature of Missouri an action of ejectment could be maintained on the equitable title thus acquired. In the Federal court, however, according to repeated decisions, this could not be done for want of the legal title."

In such cases the courts must determine which is the elder title. It was not necessary to decide nor did the court decide what is the incipient step in the acquisition of a New Madrid title to which other and subsequent acts will relate as between the locator and those claiming under him. The only question was the one propounded by the court itself: "What acts were necessary on the part of the locator *to divest the United States of title?*" When the court in this case said that Rector "acquired no vested right to the land, no title, legal or equitable," until the return of the survey to the recorder, it used the words only as applicable to the case before it. The court meant to say, as it has always said in such cases, that until such return of the survey the claimant holds "no title, legal or equitable," *as against the United States*—no such title as in equity would compel the United States to convey him the land, and no such title as would

prevent the Government from conveying it to another. In fact, in the very next paragraph the court expressly says: "On the contrary, it is obvious that the court (lower) was endeavoring to fix the point in the proceedings when the right of the claimant became vested—when his *equity* became a *fixed* fact."

In Mackey *v.* Easton (19 Wall., 619) Justice Field, delivering the opinion, said:

"The actual location of the New Madrid certificate issued to Smith was made and approved in 1818. * * * This *actual* location became a *perfected* location so as to appropriate the land on the return of the survey to the recorder in 1823."

In the case of Gibson *v.* Chouteau, 13 Wall., 92, Chouteau undertook to connect himself by conveyances with the original locator of the New Madrid certificate. These deeds purported to convey only the equitable interest, because the land was not patented until 1862. The supreme court of Missouri excluded the deeds for reasons not connected with the fact that they conveyed only an equitable interest. When the case came into this Court it was held "the rulings of the State court upon these grounds are not open to review in this Court, as they involve no questions of Federal jurisdiction."

Chouteau, failing to establish conveyances of the equitable title, set up the statute of limitations, which he claimed barred the legal title because of ten years' adverse possession prior to the issue of the patent. The supreme court of Missouri so decided. In answer to this claim this Court, in its opinion delivered by Justice Field, used the following language:

"The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice and is only applied for the security and protection of persons

who stand in some privity with the party that initiated proceedings for the land and acquired the equitable claim or right to the title.

"The defendants in this case were strangers to that party and to his equitable claim, or equitable title, as it is termed, *not connecting themselves with it by any valid transfer from the original or any subsequent holder.* The statute of limitations of Missouri did not operate to convey that claim or equitable title to them. It only extinguished the right to maintain the action of ejectment founded thereon under the practice of the State. It left the right of entry upon the legal title subsequently acquired by the patent wholly unaffected."

The learned judge, it is true, in discussing the doctrine of relation used the following language:

"Thus, in the present case the patent which was issued in 1862 is said to take effect by relation at the time when the survey and plat of the location, made in 1818, were returned to the recorder of land titles under the act of Congress. At that time the title of the claimant to land desired by him had its inception, and, so far as it is necessary to protect his rights to the land and the rights of parties deriving their interest from him, the patent is held to take effect by relation as of that date."

It will be observed that it was wholly immaterial to the decision in this case at what period the equitable title may have begun. All that is said upon that subject is wholly unnecessary to the determination of the cause.

It is not intimated that an equitable title in the claimant did not exist prior to the return of the survey to the recorder of land titles. The title evidently alluded to by the court is what the same judge referred to in other cases as a "vested" or "complete" title.

In the case of Easton *v.* Salisbury, 21 How., 426, the controversy was between a Spanish concession to Mordecai Bell and the location of Easton under a New Madrid certificate

to one Smith. The Spanish grant prevailed *quoad* the land included therein.

The case of Mackey *v.* Easton, 19 Wall., 619, came to this Court by writ of error to the United States circuit court at St. Louis, and no question as to jurisdiction arose. The controversy was, which party held the deed of the James Smith to whom the certificate was issued. Counsel for Mackey insisted that Easton's title had been held bad in the former case, and that contention brought up for re-examination the Salisbury case, and what is said in respect of the return of the survey to the recorder is applicable alone to the Salisbury and not to the Mackey case. The language of the opinion is in strict accordance with all the opinions of this Court on that subject. It was delivered by Justice Field, whose numerous opinions in this Court and in the supreme court of California show a perfect knowledge of the whole subject.

It is said that there could be "no *effectual* appropriation of the land located under a New Madrid certificate until the survey was returned to the recorder of land titles;" that until that was done "there was no official recognition of the proceedings taken by the claimant *which bound the Government.*"

These opinions are in strict accordance with others in reference to pre-emptions. In Frisbie *v.* Whitney, 9 Wall., 187, it is said:

> "A party by settlement upon lands of the United States with a declared intention to obtain a title to the same under the pre-emption laws does not thereby acquire such a *vested interest* in the premises as to deprive Congress of the power to make other disposition of them."

In the Yosemite cases, 15 Wall., 77, it is said that mere settlement on the public lands according to law creates no obligation on the Government to convey the land pre-empted; but "when the pre-emptor has complied with *all*

preliminary requirements and paid for the land he for the first time acquires a *vested* interest in the premises, of which he cannot be deprived."

Wisth *v.* Branson, 98 U. S., 118.

"He is then entitled to a certificate of entry from the local land officer and ultimately to a patent for the lands from the United States."

The Yosemite case, 15 Wall., 77.

Until such payment and entry the pre-emption laws give to the settler a privilege, only in case the lands are offered for sale, of purchasing them in preference to others. (*Idem.*)

And it is this privilege alone which in the case of Shepley *v.* Cowan, 91 U. S., 330, this Court said constituted the *incipient step* in the acquisition of title. The Court said:

"Thus the patent upon a State selection takes effect as of the time when the selection is made and reported to the land office, and the patent upon a pre-emption settlement takes effect from the time of the settlement as disclosed in the declaratory statement or proofs of the settler to the register of the local land office."

In the opinion of Justice Field for the Court in this case (Shepley *v.* Cowan) is to be found tersely expressed the whole law of the case at bar:

"In these cases [alluding to Frisbie *v.* Whitney, 9 Wall., and the Yosemite case, 15 Wall.] the Court only decided that a party by mere settlement upon the public lands, with intention to obtain a patent under the pre-emption laws, did not thereby acquire such a vested interest in the premises as to deprive Congress of the power to dispose of the property; that, notwithstanding the settlement, Congress could reserve the lands from sale whenever they might be needed for public purposes, as for arsenals, fortifications, light-houses, hospitals, &c.; that the settlement, even when accompanied with an improvement of the property, did not confer upon the settler any right in the land as against the United States or impair in any respect the power of Con-

gress to dispose of the land, &c.; but whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may as against each other acquire a right to be preferred in the purchase or other acquisition of the land when the United States have determined to sell or donate the property."

And so in the case of Thredgill *v.* Pintard, 12 How., 24, it is held that—

"Where a party sells his pre-emption and the vendee sells to a third person, such third person agreeing to pay a part of the purchase-money due the first vendor, such original vendor may enforce a lien against the land, although the patent be issued in the name of the second vendee."

Counsel refers to an appendix for the laws of Missouri in force at the date of the sheriff's sale and for decisions of the Missouri courts thereon.

J. B. HENDERSON,
For Defendant.

APPENDIX.

EXTRACTS FROM TERRITORIAL LAWS OF MISSOURI, 1 VOL., 119.

§ 41. "Judgments obtained in the general court shall be a *lien* on the lands and tenements of the person or persons against whom the same has been entered, situate in any part of this Territory, and judgments obtained in a court of common pleas of any district shall be a *lien* on the lands and tenements of the person against whom the same has been entered situate in such district: *Provided*, That no judgment now on record in any court within this Territory shall continue a *lien* on the lands and tenements of the person against whom the same has been entered during a longer term than five years from and after the passing of this act, unless the person who has obtained such judgment or his legal representative or other person interested shall within the said term of five years sue out of the court where the same has been entered a writ of *scire facias* to revive the same."

Approved July 3, 1807.

§ 42. "All lands, tenements, and hereditaments whatsoever within this Territory, where no sufficient personal estate can be found, shall be liable to be seized and sold upon judgment and execution obtained."

Idem, 120.

§ 45. "Where the lands and tenements shall be taken in execution by the sheriff, it shall be his duty to expose the same to sale at the court-house door on some day while the courts of common pleas or quarter sessions in the district are in session, having previously given twenty days' notice of the time and place of sale and what lands and tenements are to be sold and where they lie by at least six handbills affixed in the most public places in different parts of the district, and upon such sale the sheriff shall make return of the writ, together with a copy of the advertisement put up as aforesaid, and give the buyer a deed,

duly executed and acknowledged in court, for what is sold; which deed shall recite the execution, purchase, and consideration and shall be effectual for passing to the purchaser all the estate and interest which the debtor had or might lawfully part with in the lands at the time the judgment was obtained."

Idem, 120.

§ 1. From and after the taking effect of this act in all cases where any persons shall purchase any real estate within this Territory from any person having the equitable but not the legal title thereof, and which purchase shall be attested by a deed in the form of a deed of conveyance or by a bond to make a title to the real estate so sold, or by any other instrument in writing signed by the party to be charged therewith or by any other person duly authorized to sign the same for him, it shall and may be lawful for the person so purchasing, after proving the execution thereof, to exhibit the said deed, bond, or instrument in writing, to be recorded in the recorder's office in the same county wherein the said real estate is situated, where it shall be received and recorded in the same manner and upon the same conditions as are provided by law for the recording of mesne conveyances; and any such deed, bond, or instrument in writing so recorded shall import from the day of recording the same full and perfect notice to all persons of the sale of the land therein mentioned; and all subsequent purchasers of the same land shall be deemed and held in law and equity to have purchased with notice of the prior sale, and shall gain no right to the prejudice of the first purchaser.

§ 2. All deeds, conveyances, bonds, and other obligations for lands, tenements, or hereditaments hereafter made and proven or acknowledged before any competent authority shall be recorded in the county in which such lands, tenements, and hereditaments are situate within three months from the date thereof, or the same shall be void against subsequent purchasers so recording their said deeds, conveyances, bonds, or other obligations within the time prescribed by this section.

(Approved February 1, 1817.)

Idem, p. 543.

AN ACT to prevent fraudulent conveyances and for other purposes.

WHEREAS, from the unsettled state of land titles in this State, it has often happened that persons having incomplete titles to lands have sold the same and made conveyance in writing therefor, and said persons so selling already have or hereafter may receive a patent issued by the United States for the same land, and by selling the same again to some person ignorant of the first sale may commit great fraud, to the injury of prior purchasers: *Be it enacted, &c.:*

§ 1. If any person shall hereafter sell or convey a lot of ground or tract of land he had before that time sold and conveyed or covenanted and bound himself by any written instrument to sell or convey to any other person or persons ignorant of the first sale and conveyance, the person so making such second conveyance or covenanting or binding himself by any instrument in writing so to do shall be held and deemed to have committed a fraud against the first purchaser and shall be liable to be indicted for the same and to be punished by fine not exceeding double the value of the land so sold and by imprisonment not exceeding twelve months, and that all such sales shall be invalid in law and equity: *Provided* such first sale, conveyance, or written instrument to sell or convey shall have been duly recorded according to law: *Provided also*, That nothing herein contained shall be construed to affect any person entitled to military bounty lands for military services rendered the United States.

(Approved December 6, 1821.)

Idem, 797–'8.

§ 61. Judgments obtained in the supreme court shall be a lien on the real estate of the person against whom the same are rendered, situate in any part of the judicial district for which the court is held, and judgments rendered by circuit courts shall be a lien on the real estate of the person against whom they are rendered, situate in the county for which the court is held, and all liens shall commence on the day of the rendition of the judgment and shall continue for three years thereafter, and no longer, unless the plaintiff in such judgment or his legal representatives shall within the said term of three years sue out of the court in which the judgment was rendered a *scire facias* to revive the same.

* * * And on due proof of the service of the *scire facias* or of the publication of such notice as aforesaid the court, unless sufficient cause to the contrary be shown, at the second term after issuing the writ, shall revive the said judgment during another period of three years against the lands and tenements of the said defendant, and so on from time to time as often as necessary; and the writs of *scire facias* hereby authorized may be issued by any court of record wherein the judgment was rendered to any county in this State where the defendant resides.

(Approved Jan. 11, 1822.)

Idem, 855.

THE FOREGOING STATUTES CONSTRUED BY THE SUPREME COURT OF MISSOURI.

In Landes *vs.* Perkins, 12 Mo., 259, the supreme court of Missouri said:

"It is a matter of history, of which this court will take judicial notice, that at the time of the cession of Louisiana to the United States, in that portion of the territory of which this State is composed, nineteen-twentieths of the titles to lands were like that involved in this case prior to its confirmation. There were very few complete grants. * * * There being so few complete titles, the legislature, in subjecting lands and tenements generally to execution, must have contemplated a seizure and sale of those incomplete titles which existed under the Spanish government. At the date of the act above referred to (Oct. 4, 1804, by the territorial legislature subjecting lands to sale) no titles had been confirmed by the United States. An instance is not recollected in which a question has been made as to the liability of such titles as Clamorgan's under the Spanish government to sale under execution. It is believed that such titles have been made the subject of judicial sales without question ever since the change of government."

FORCE AND EFFECT OF BONDS TO CONVEY.

In the case of Papin *vs.* Murphy, 27 Mo., 452, the supreme court of Missouri said: "It plainly appears from the bond

that its object was to secure the conveyance of the land. It was then a contract which a court of equity would specifically enforce. If it was such a contract *it created an interest in the land*, for courts of equity regard that as done which a party agrees to do. A bond imports a consideration. To require proof of the consideration of a bond upwards of thirty years old would have the effect of declaring all such instruments of no avail. * * * Of what avail would be the rule of law which makes age prove the due execution of an instrument if the consideration of it has afterwards to be established?"

Easton admits he made a bond to Hammond. He says he conveys the land in pursuance of the conditions of that bond. The object of the bond, therefore, was to secure the conveyance. The courts will compel specific performance of the agreement as made and understood by the parties.

If Hammond had not already paid for the land before the rendition of the judgment against him in May, 1823, is it likely that he would have then paid when other suits for large amounts were being prosecuted against him, and when, in the midst of his pecuniary misfortunes, he was evidently contemplating leaving the State?

The laws of Missouri at that time recognized title bonds as sufficient to affect title to real estate, and authorized their acknowledgment and record in the same manner as conveyances in fee.

The same provisions in regard to constructive notice by record applied to bonds as to deeds. It was, no doubt, thought by Hammond unnecessary in this case to record the bond. Between the parties it was equally good without record.

FORCE AND EFFECT OF DEEDS CONVEYING EQUITABLE TITLES OR WHERE VENDOR HAS NO TITLE.

In Bogy *vs.* Shoab, 13 Mo., 365, the court says:

"The Revised Code of 1825 (of Missouri) contains this provision: 'If any person shall sell and convey to another by deed or conveyance purporting to convey an estate in fee simple absolute in any tract of land or real estate lying or being in this State not then being possessed of the legal estate or interest therein at the time of the sale or conveyance, but after such sale and conveyance the vendor shall

become possessed of and confirmed in the legal estate to the land or real estate so sold and conveyed, it shall be taken and held to be in trust and for the use of the grantee or vendee, and the conveyance aforesaid shall be held and taken and shall be as valid as if the grantor or vendor had the legal estate or interest at the time of said sale or conveyance.'

"It is argued," says the court, "however, that this act is limited to cases where the vendor has the equitable title, and does not mean a case where the vendor has no title at all. The language of the act requires no such limitation. A vendor has not the legal estate either where he has an equitable title only or where he has no title at all. * * * I think it was the intention of the legislature to give the legal title to such as had *acquired an equity* by the conveyance, and this did not depend upon the character of title which the vendor had at the time of the deed, but upon the character of the deed itself. A deed may be upheld in equity, although the grantor had nothing at the time of its execution, if the consideration be sufficient, and it is against good conscience in the vendor to permit it to be defeated."

The court then defined a deed in fee simple absolute to be "a deed conveying the land itself and professing to convey it in such a manner that the grantee is not to be disturbed in his possession by any one."

"It (this statute) puts the whole question upon principles of sound sense and strict justice. It does not limit its operation to deeds containing covenants of general warranty, but it extends to every deed which purports to convey a fee simple absolute, whether it contains a general warranty or not."

AS BETWEEN PARTIES TO A CONVEYANCE THE DEED IS PRESUMED TO HAVE BEEN EXECUTED ON THE DAY OF ITS DATE AND NOT ON THE DAY OF ITS ACKNOWLEDGMENT.

An objection urged by plaintiff is that although Easton's deed to Hammond is dated on September 29, 1823, it was not acknowledged until the 9th day of October, whereas the sheriff's sale was made on the 8th day of October, 1823. It is thereupon argued that a deed is presumed to be executed on the day of its acknowledgment, and hence that there was nothing in Hammond to sell on the day of sale.

A deed is perfectly good between the parties to it without acknowledgment. An acknowledgment is only necessary to secure record and furnish proof of execution. The record is alone for the benefit of third persons. It furnishes notice of a conveyance and protects the grantee against subsequent conveyances by the grantor. When the grantor has made two deeds to different persons for the same land the date of acknowledgment may become an important fact. If a grantor between the date and the acknowledgment of his deed to A conveys for value to B and B is a purchaser without notice of the sale to A, it is competent for B to insist that as against him the date of acknowledgment must be taken as the date of the execution of A's deed. The reason of this rule is furnished by the bare statement of the case. It is in such case necessary to protect the rights of an innocent purchaser; but if a conveyance is effective to pass the title as between the parties themselves without acknowledgment, why should the date of acknowledgment control the date of the deed? As between parties to a conveyance the law presumes, as common sense would suggest, that the deed was executed the day it bears date.

Abrams *vs.* Pomeroy, 13 Ills., 133.
Meldrum *vs.* Clark, 1 Marr. (Iowa), 130.
Beck *vs.* Cole, 4 Sandf. (N. Y.), 79.
Dodge *vs.* Hopkins, 14 Wis., 630.

The rule is without exception that unless the rights of third persons are injuriously affected thereby, the acknowledgment of a deed relates back to the date of the instrument. Not only is this rule applied to deeds made by act of the parties, but it applies to sale made in *in invitum*. In the case of the Lessee of Foster *vs.* Executors of Duggan, 8th Ohio, 107, the court said: "The case shows that the deed was made by the sheriff while in office; his subsequent acknowledgment thereof after his term had expired is carried back by relation to the time of execution."

Whatever of title or interest, legal or equitable, Easton may have had at any time from September 3, 1818, to October 8, 1823, was vested in Hammond. An agreement to convey, followed by actual conveyance, is the incipient step in such final conveyance; and the rule is unbroken that a final conveyance, when made as between the parties, relates back to the date of such original agreement. In

other words, when Easton delivered his deed to Hammond it related back to September 3, 1818, and conveyed to Hammond all right, title, and interest that would otherwise have been owned by Easton between the date of that recited title bond and the execution of the deed.

Jackson *vs.* Bard, 4 Johns., 230.
Jackson *vs.* Raymond, 1 John's Cases, 85, and note.

Also—

3 Caines, 263.
Johnson *vs.* Stagg, 2 Johns., 520.
Jackson *vs.* Dickson, 15 Johns., 309.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 114.

DAVID L. HAMMOND, CHARLES L. HAMMOND ET. AL.,
Plaintiffs in Error,

vs.

WALTER S. JOHNSTON, Receiver of the National Bank of the State of Missouri, in St. Louis, et al.,
Defendants in Error.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

JAMES M. LEWIS,
Attorney for Defendants in Error.

IN THE

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BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR ON QUESTION OF JURISDICTION.

This suit is in the nature of an action of ejectment to recover posession of about ten acres of land, situated in the Western portion of the City of St. Louis, in the State of Missouri. It was commenced in the St. Louis Circuit Court on June 15, 1874. The plaintiffs in error were defeated in the trial court. The judgment was affirmed on appeal to the Supreme Court of Missouri, and the present writ is prosecuted to that Court. The defendants in error contend that the Supreme Court of the United States is without jurisdiction and that the writ should be dismissed.

BRIEF IN SUPPORT OF DISMISSING WRIT OF ERROR.

The writ of error should be dismissed for want of jurisdiction in the Supreme Court of the United States.

The writ is based upon alleged errors in the judgment of the Supreme Court of the State of Missouri.

The jurisdiction of the Supreme Court of the United States depends upon Section 709, Revised Statutes, whose familiar provisions limit that jurisdiction in cases of writs of error, to courts of the States, to instances: "*Where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statutes of the United States and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party.*"

The circumstances under which the Supreme Court of the United States can entertain jurisdiction by virtue of this statute have been clearly indicated by an unbroken line of decisions.

1. The Court will act only upon the record of the Court below and of that record the petition for a writ of error forms no part.

Warfield vs. Chaffe, et al., 91 U. S. 690;

Clark vs. Pennsylvania, 128 Id. 395;

Manning vs. French, 133 U. S. 186;

Butler vs. Gage, 138 U. S. 52;

Leeper vs. Texas, 139, U. S. 462.

This invariable rule saves the necessity of any reference to the petition for the writ of error in the present record. The examination as to the existence of a Federal question must be limited to the record proper and to that alone.

2. It is essential that the record should disclose that the alleged title, right, privilege or immunity was "*specially set up or claimed*" at the proper time, in the proper way.

Spies vs. Illinois, 123 U. S. 131;

Chappell vs. Bradshaw, 128 U. S. 132;

Baldwin vs. Kansas, 129 Id. 52;

Leeper vs. Texas, 139 U. S. 462.

3. Not only must the record show that the title, right, privilege or immunity was "specially set up or claimed at the proper time in the proper way," but it must also show that the decision of the State court was against the right, title, privilege or immunity so specially set up or claimed.

Fulton vs. McAffee, 16 Pet. 149;

Linton vs. Stanton, 12 How. 423;

Ryan vs. Thomas, 4 Wall. 603;

Clark vs. Pennsylvania, 128 U. S. 395;

Quimby vs. Boyd, Id. 488;

DeSaussure vs. Gaillard, 127 U. S. 216;

Missouri vs. Andriano, 138 U. S. 496.

4. And in addition to satisfying the foregoing conditions the record must show that where a Federal question was presented and decided, such decision was necessary to the determination of the cause, or that the judgment as rendered could not have been given without deciding such Federal question.

Klinger vs. Missouri, 13 Wall. 257;

Bolling vs. Lersner, 91 U. S. 594;

N. O. Waterworks vs. Sugar Co. 125 U. S. 18;

Hopkins vs. McLure, 133 U. S. 380;

Blount vs. Walker, 134 U. S. 607;

Johnson vs. Risk, 137 U. S. 300;

Cook County vs. Canal Co. 138 U. S. 635.

5. In actions where both parties claim under the United States a federal question cannot be presented within *Section 709 Revised Statutes*

Romie vs. Casanova, 91 U. S. 379.

ARGUMENT.

Testing the present writ of error by the foregoing established rules, the defendant in error submits that the writ ought to be dismissed for want of jurisdiction. The record shows that the Supreme Court of Missouri amended its opinion so as to leave no doubt as to the questions passed upon by the Court.

Those questions were:

FIRST, WHETHER THE DEED OF THE SHERIFF UNDER EXECUTION IN THE SUIT OF "RELFE & CHEW VS. HAMMOND" WAS PROPERLY ADMITTED IN EVIDENCE BY THE TRIAL COURT.

The plaintiffs in error contended that the deed was improperly admitted in evidence.

A. *Because only a certified copy was offered.*

It is manifest that this ground of objection did not raise a Federal question. Nothing was involved but a question of admissibility of evidence. No statute was involved but a statute of Missouri. No right or immunity was claimed under any act of Congress, and no such right was denied by the Supreme Court of Missouri.

B. Because at the time of the sale under the execution Hammond possessed no vendible estate in the land sought to be sold under the execution and conveyed by the deed of the sheriff.

Upon this ground the Supreme Court of Missouri ruled that Hammond did have an equitable interest in the property long before the date of the judgment or the sheriff's sale. The judgment was obtained May 22d, 1823; Rufus Easton owned the whole survey, and as early as 1819 conveyed a part to Stokes, and the calls in this deed recognized Hammond's part of the survey. Furthermore, Easton conveyed to Hammond, September 29th, 1823, and the deed

recited that it was based upon a bond for a deed, from Easton to Hammond, dated September 3d, 1818. For these reasons the Supreme Court of Missouri held that Hammond had an equitable interest vendible under execution. Now it is manifest that a Federal question was not involved in this phase of the objection to the deed of the sheriff. The defendant in error offered the deed to show that Hammond had been divested of his title. The plaintiffs in error claimed under Hammond. They objected to the deed because on their theory it conveyed nothing out of Hammond. Hence it was irrelevant. But the court ruled that the evidence was competent, because Hammond had a vendible interest, and this not because of any statute of the United States, but because of a statute of Missouri, as well as the general principles of the law. The conclusion reached by the Supreme Court of Missouri that Hammond had an interest in the property at the date of the sale under the execution is not dependent upon the construction of any statute of the United States, nor the force and effect of any act of Congress.

No title in the ancestor of the plaintiffs in error was denied. On the contrary it was recognized. No right or immunity in the plaintiffs in error under any act of Congress was set up in regard to the deed, and there was no decision adverse to any right or immunity of the requisite kind.

C. *Because Easton had no interest in the property in that the Surveyor-General had not, at the date of Easton's deed to Hammond, returned a plat of the survey to the recorder of land titles and did not do so until 1833. Hence the title remained in the United States and the purchaser at the Sheriff's sale took nothing by the deed.*

The Supreme Court of Missouri held that this objection was not well taken because under the doctrine of title by relation the acts subsequent to the date of the deed from Easton and the deed of the sheriff inured to the benefit of

Easton and those claiming under him. The ingenuity of man cannot torture the ruling of the Court in this regard into a denial of any right or title or immunity under the Statutes of the United States. The plaintiffs in error contended that the time when Easton conveyed to Hammond, and when the sheriff sold under the execution in 1823, the title to the lands was in the United States. But the Court conceded that the legal title was in the United States. Such title as was "set up" was not denied but recognized. The Supreme Court of the United States will not find in this a decision adverse to a title asserted under an act of Congress. Now when the Supreme Court of Missouri, having recognized the title as claimed by the plaintiffs in error, proceeded to hold that while there was no legal title in Easton when the sheriff sold, or when Easton conveyed, yet subsequent acts converted the equitable into a legal title, and that legal title inured to the holders of the equity there was no denial of a right, or immunity which arose under an act of Congress. "It is true beyond all doubt," say the Supreme Court of Missouri in regard to this point, "that as between Easton and those claiming under him on the one hand and the United States on the other, there was no vested right in Easton and those claiming under him, *as against the United States*, until the surveyor returned the plat to the recorder of land titles, which was not done until 1833. But as between Easton and third persons he did acquire a priority and a right which the courts respect and uphold and enforce. The fact that this right was not such as to deprive Congress of the powers of otherwise disposing of the land makes it none the less a valuable right and an interest in and to the land. It was a right subject to sale under execution, for the law then said the sheriff's deed should be effectual for passing to the purchaser all the estate and interest which the debtor had at the time of the judgment."

Hammond vs. Johnston, 93 Mo., 213–4.

It is contended that the Supreme Court of the State of Missouri decided

THAT ONE OF THE PLAINTIFFS IN ERROR WAS BARRED BY LIMITATION.

The court of last resort in Missouri held that the plaintiffs in error had no title at all, not because of limitations merely, but because their ancestor had been divested of his title by sheriff's sale. The question involved in this determination was not a Federal question. It was not necessary to go farther and consider other questions. The Court had already passed upon questions decisive of the case, and which were conclusive against all the plaintiffs in error independent of the question of limitation, and upon the merits of their title. The case therefore falls within the familiar rule laid down in "Klinger vs. Missouri, 13 Wall. 257, and followed in all the succeeding cases." Where the Supreme Court of the State decides a Federal question in rendering a judgment, and also decides against the plaintiff in error on an independent ground not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question.

"Hopkins vs. McClure, 133 U. S. 380."

The Supreme Court of Missouri uses this language: "Under the view we take of the sheriff's deed and the force and effect we give to it, the title is in defendant and the judgment will be affirmed. This result as to the effect of the sheriff's deed renders it unnecessary to pass upon the other questions presented by the record, but we have ruled upon them in order that there may be no embarrassment to either party in a review of this judgment in the Supreme Court of the United States." Here is an authoritative declaration by the Supreme Court of Missouri that the controlling ques-

tion with that court was the effect of the deed of the sheriff A Federal question was not presented in the admissibility of that deed.

Finally, the defendant in error respectfully submits that the ruling in Romie vs. Casanova, 91 U. S. 379, is decisive of the present writ of error. There both parties claimed under the United States, and it was held that the judgment of the State Court was not reviewable under Section 709. Here both parties claim under the United States. The common source of title is the New Madrid location. The plaintiffs in error contended that the equitable title vested in Hammond by the deed of Easton, was not lost by reason of the sheriff's sale. The defendant in error contended that by virtue of the sheriff's deed and mesne conveyances thereafter he hold the title which passed from the Government by the patent to Joseph Hunot or his legal representatives. That was an issue entirely for the courts of Missouri. That issue was determined in favor of the defendants in error.

The several states are vested with the sole power of determining the forms and requisites for conveying within their respective jurisdictions. And the State courts alone can determine the effect of such conveyances.

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